Office-Supreme Court, U.S.
FILED
FEB 3 1983
ALEXANDER L. STEVAS,
CLERK

82-1300

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA STATE BAR, et al.,
Petitioners,

v.

CONSUMERS UNION
OF UNITED STATES, INC., et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. PATTERSON, JR.*
ANNE MARIE WHITTEMORE
DAVID C. BANKER
McGuire, Woods & Battle
Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for Petitioners

**Counsel of Record*

TABLE OF CONTENTS

Page

APPENDIX A-1

Opinion and Judgment of the Court of Appeals for the Fourth Circuit, August 9, 1982 ..... A-1

Order of the Court of Appeals for the Fourth Circuit, Denying Petitioners' Motions for Rehearing and Suggestion for Rehearing in Banc, December 28, 1982 ..... A-15

Opinion and Judgment of the District Court for the Eastern District of Virginia, May 8, 1979 ..... A-17

Opinion and Order of the Supreme Court of the United States, June 2, 1980 ..... A-58

Order of the Supreme Court of the United States, June 9, 1980 ..... A-79

Opinion and Judgment of the District Court for the Eastern District of Virginia, January 8, 1981 ..... A-80

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ..... A-99

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

VIRGINIA STATE BAR, et al.,
Petitioners,

v.

CONSUMERS UNION
OF UNITED STATES, INC., et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CONSUMERS UNION OF UNITED STATES, INC.; Virginia Citizens Consumer Council, Appellees,

v.

VIRGINIA STATE BAR; James C. Roberts, in his capacity as President of the Virginia State Bar; Alex Mayo, in his capacity as Chairman of the Legal Ethics Committee, Virginia State Bar, Defendants,

and

Supreme Court of Virginia; Hon. Lawrence I'Anson, individually and in his capacity as Chief Justice of the Supreme Court of Virginia, Appellants.

CONSUMERS UNION OF UNITED STATES, INC.; Virginia Citizens Consumer Council, Appellants,

v.

VIRGINIA STATE BAR; James C. Roberts, in his capacity as President of the Virginia State Bar; Alex Mayo, in his capacity as Chairman of the Legal Ethics Committee, Virginia State Bar, Appellees,

and

Supreme Court of Virginia; Hon. Lawrence I'Anson, individually and in his capacity as Chief Justice of the Supreme Court of Virginia, Defendants.

Nos. 81-1155(L), 81-1156.

United States Court of Appeals,
Fourth Circuit.

Argued Nov. 3, 1981.

Decided Aug. 9, 1982.

Before WINTER, Chief Judge, FIELD, Senior Circuit Judge, and CHAPMAN, Circuit Judge.

FIELD, Senior Circuit Judge:

These appeals from the decision of the three-judge District Court come to us following two prior appeals to the Supreme Court of the United States during the pendency of this action. In the second appeal, *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), the Court held that Virginia's Disciplinary Rule (D.R.), 2-102(A)(6) of the Virginia Code of Professional Responsibility (Bar Code) unconstitutionally inhibited the gathering of information incident to the publication of a legal services direc-

tory, and that in this suit under 42 U.S.C. § 1983 the Consumers Union of the United States, Inc. (Consumers Union) was entitled to declaratory and injunctive relief against both the Virginia State Bar (Bar) and the Supreme Court of Virginia and its chief justice (Virginia Court). The sole question presented on these appeals is whether Consumers Union, having prevailed in its section 1983 action, is entitled to recover attorney's fees from the Bar and/or the Virginia Court under 42 U.S.C. § 1988.

This case had its inception in 1974, when Consumers Union attempted to prepare a directory of attorneys practicing in Arlington County, Virginia. However, attorneys contacted by Consumers Union declined to supply information for the directory fearing that it would violate the prohibition against attorney advertising contained in D.R. 2-102(A)(6). Consumers Union then instituted this action under section 1983 against the Virginia Court and the Bar requesting a declaratory judgment that they had violated Consumer Union's First and Fourteenth Amendment rights to gather, publish and receive factual information, and a permanent injunction against the enforcement of D.R. 2-102(A)(6).

On December 17, 1976 a three-judge District Court, convened pursuant to 28 U.S.C. § 2281, held that D.R. 2-102(A)(6) unconstitutionally restricted the right of Consumers Union to receive and gather non-fee information and information concerning initial consultation fees. *Consumers Union of United States, Inc. v. American Bar Association*, 427 F.Supp. 506 (E.D.Va.1976). In addition, the court permanently enjoined the Virginia Court and the Bar from enforcing D.R. 2-102(A)(6) except for the prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

Consumers Union appealed the District Court's decision declining to enjoin enforcement of the fee advertising provision directly to the Supreme Court. The Virginia Court and the Bar filed a cross-appeal, contending that D.R. 2-102(A)(6) should have been upheld in its entirety. The Supreme Court vacated the judgment of the District Court and remanded the case for further consideration in light of *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which it had decided after the appeals were filed. *Virginia State Bar v. Consumers Union of the United States, Inc.*, 433 U.S. 917, 97 S.Ct. 2993, 53 L.Ed.2d 1104 (1977).

On remand, the Virginia Court and the Bar conceded that under *Bates*, D.R. 2-102(A)(6) could not be constitutionally enforced against attorneys from whom Consumers Union sought information for its directory. The District Court ruled that D.R. 2-102(A)(6) was unconstitutional on its face and permanently enjoined the Virginia Court and the Bar from enforcing it. *Consumers Union of United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D.Va.1979).

Consumers Union also requested that the District Court allow them reasonable attorney's fees pursuant to 42 U.S.C. § 1988. The District Court awarded attorney's fees against the Virginia Court, but concluded that special circumstances rendered such an award against the Bar unjust since it had previously petitioned the Virginia Court recommending amendments to the Bar Code Disciplinary Rules which the Bar believed would ensure the constitutionality of the Rules governing attorney advertising.

On June 7, 1979, the Virginia Court again appealed the District Court's judgment allowing declaratory and injunctive relief as well as attorney's fees against it. Consumers

Union cross-appealed the District Court's decision refusing to award attorney's fees against the Bar. While upholding the declaratory and injunctive relief entered against the Virginia Court, the Supreme Court vacated and remanded the District Court's decision to assess attorney's fees against the Virginia Court. *Supreme Court of Virginia v. Consumers Union, supra.* In a separate order, the Court vacated the decision of the District Court not to award attorney's fees against the Bar and remanded the case for reconsideration in light of its opinion in *Supreme Court of Virginia v. Consumers Union.*

Upon remand, the District Court reiterated its prior determination that the Virginia Court was liable to Consumers Union under section 1988 for attorney's fees, but again declined to award any fee against the Bar. *Consumers Union of the United States, Inc. v. American Bar Association,* 505 F.Supp. 822 (E.D.Va.1981). Thereafter, the Virginia Court appealed the fee award entered against it both to the Supreme Court and to this Court. Consumers Union also cross-appealed that portion of the District Court's judgment denying a fee award against the Bar to the Supreme Court and to this Court. On May 26, 1981, the Supreme Court dismissed both appeals for lack of jurisdiction,[1] and, accordingly, at this juncture appellate jurisdiction rests solely with this Court.

---

[1] *Supreme Court of Virginia v. Consumers Union of the United States,* 451 U.S. 1012, 101 S.Ct. 2999, 69 L.Ed.2d 384 (1981); *Consumers Union of the United States v. Virginia State Bar,* 451 U.S. 1012, 101 S.Ct. 2999, 69 L.Ed.2d 384 (1981). The Supreme Court did not have appellate jurisdiction under 28 U.S.C. § 1253 to entertain a direct appeal of the attorney's fee dispute since the question of injunctive relief sought pursuant to the section 1983 issue was no longer before the Court. *See Supreme Court of Virginia v. Consumers Union, supra,* 446 U.S. at 737, n. 16, 100 S.Ct. at 1977, n. 16.

In our consideration of these appeals we are, of course, guided largely by the observations of the Court in its opinion in *Supreme Court of Virginia v. Consumers Union, supra.* In vacating the District Court's award of attorney's fees against the Virginia Court, the Supreme Court noted that in regulating the Bar "the Virginia Court is exercising the State's entire legislative power . . . [in this respect], and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity." 446 U.S. at 734, 100 S.Ct. at 1975. The Court went on to observe that if the sole basis for the plaintiffs' action was the promulgation of the challenged rules, legislative immunity would preclude suit against the Virginia Court under section 1983.

With respect to the question of judicial immunity, the Court discerned no reason to resolve that issue, stating:

> We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were. (Footnote omitted).

Id., at 736, 100 S.Ct. at 1976. The Court then concluded that "because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case." (Footnote omitted). *Id.*, at 737, 100 S.Ct. at 1977.

The Court, finding that the District Court's award of attorney's fees was based on acts or omissions for which appel-

lants enjoyed absolute immunity, vacated the award as erroneous. The Court concluded, however, that:

> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. * * * Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role.

Id., at 739, 100 S.Ct. at 1978.

Counsel for the Virginia Court contends that under the Supreme Court's decision it was incumbent upon the District Court upon remand to inquire into the question of whether the Virginia Court had, in fact, exercised its enforcement authority. Counsel further suggests that in the absence of evidence that the Virginia Court had acted in an enforcement capacity a "case or controversy" would not exist between it and Consumers Union. We agree with counsel for Consumers Union that these arguments are answered and foreclosed by the opinion of the Court itself. In regard to the latter contention, the Court specifically recognized the existence of a "case or controversy", stating:

> Of course, as *Boyle v. Landry, supra,* [401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971)] and *O'Shea v. Littleton, supra,* [414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)] indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person v. Association of the Bar of New York,* 554 F.2d 534, 536-537 (CA2 1977).

Id., 446 U.S. at 736, n. 15, 100 S.Ct. at 1977, n. 15.

As we have noted, the Supreme Court found that on the record before it a fee award against the Virginia Court was appropriate in this case "absent some special circumstances". Upon its review of the record the District Court concluded that there were no special circumstances which would render an award of attorney's fees unjust under the rationale of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), and we agree that under the standard of that case the award to Consumers Union as a prevailing civil rights plaintiff was appropriate and correct.

We, however, disagree with the decision of the District Court that special circumstances exist in this case which would render a fee award against the Bar unjust. In adhering to its original view, the District Court stated "[a]s before, this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards." 505 F.Supp. at 823. If the basis of any fee award was the promulgation of the subject Rule, this ameliorative action of the Bar might render an award against it unfair. The approval of a fee award by the Supreme Court, however, was not based upon the legislative action of the Virginia Court in promulgating the Rule, but rested solely upon its direct enforcement role. Under the Virginia Disciplinary format, the Bar played an equally significant enforcement role which was recognized by the Court when it observed:

> We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a

> different or more timely manner, there would have been no need for a lawsuit or for an injunction.

446 U.S. at 739, 100 S.Ct. at 1978.

In the context of this controversy, we find it difficult to separate the activity of the Bar from that of the Virginia Court. The record shows that the Bar recommended the promulgation of the original unconstitutional rule, and took steps to amend the rule only after this lawsuit was instituted. It would fly in the face of the policy of section 1988 to recognize such a tardy response as a special circumstance which would preclude an award against the Bar. Nor can we overlook the fact that when the Bar was moved to act, the amendment it proposed would still have prohibited the publication of fees for routine legal services and thus would have continued to infringe the First Amendment rights of the plaintiffs. There can be no doubt that in the area of enforcement there was a "case and controversy" between the Bar and Consumers Union. The record discloses that Consumers Union unsuccessfully sought a ruling from the Bar certifying the Directory as a "reputable publication," and a Virginia attorney was advised by the Bar that the Rule would not permit an attorney to give Consumers Union the information which it requested for the Directory.

It is now axiomatic that plaintiffs who prevail in actions brought under section 1983 are entitled to attorney's fees unless special circumstances would render such an award unjust, and the discretion of a district court in deciding whether to award such fees to a prevailing party is narrowly limited. *Bonnes v. Long*, 599 F.2d 1316 (4 Cir. 1979). Upon the record in this case the Bar as well as the Virginia Court was properly liable to the plaintiff by reason of the Bar's enforcement role, and we discern nothing which would reasonably support the conclusion that an award of attor-

ney's fees against it would be unjust. Accordingly, we hold that it was an abuse of discretion for the District Court to decline an award of fees against the Bar.

The action of the District Court in awarding attorney's fees against the Virginia Court in Case No. 81-1155(L) is affirmed. The order of the District Court denying an award against the Bar in Case No. 81-1156 is reversed and the case is remanded for further proceedings consistent with this opinion.[2]

NO. 81-1155(L) AFFIRMED.

NO. 81-1156 REVERSED AND REMANDED.

CHAPMAN, Circuit Judge, dissenting:

I respectfully dissent and suggest that the majority of this court, as did the majority of the district court, has misread *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). The three-judge district court in *Consumers Union of the U. S. v. American Bar Association*, 505 F.Supp. 822 (E.D. Va. 1981) referring to Consumers Union II[1] stated at 823:

> The Supreme Court vacated the award of attorney's fees because it rested in part on consideration of the Virginia Court's adoption, and retention even after *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), of the disputed disciplinary provision—actions the Supreme Court held to enjoy absolute legislative immunity.

---

[2] The fees to be fixed by the district court upon remand should, of course, include services rendered in these appeals as well as all of the prior proceedings, including the appeals to the Supreme Court of the United States.

[1] This is a 1980 decision of the Supreme Court and so designated as to keep down confusion with Consumers Union I, decided in 1977, and Consumers Union III, decided in 1981. I assume there will be a Consumers Union IV at some date in the future.

I do not read Consumers Union II as indicating that the attorney's fees awarded by the district court rested in part on its legislative-rule making role. The fees awarded by the three-judge district court rested entirely upon the rule making function of the Virginia Court and the court's enforcement role was not discussed prior to the decision in Consumers Union II. The U. S. Supreme Court did not find that the Virginia Court was liable for attorney's fees in its direct enforcement role or that such enforcement role played any part in awarding of fees. If this had been the finding, the court would have either affirmed or would have remanded with directions to the district court to find a proper fee.

The Supreme Court did neither, but stated at page 738:

> We are unable to agree that the attorney's fees should have been awarded for the reasons relied on by the district court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the district court's award of attorney's fees in this case was premised on acts or omissions for which appellants enjoyed absolute legislative immunity. This was error.

At 739, 100 S.Ct. at 1978 the court makes it equally clear that the court's enforcement role was not a part of the prior fee award:

> Because the Virginia court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

The court went on to say:

> This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case.

Therefore, the Supreme Court must have remanded for reconsideration of the enforcement role based upon something that was not in the existing record. With no addition to the record, the district court found that the Virginia Supreme Court was liable solely upon its enforcement role under the statute.

There is a difference between a statement by the Supreme Court that a party is subject to suit and a conclusion by the court that such party is liable as a result of the suit. The majority of the district court, and the majority of this court, seem to have crossed the chasm between being subject to suit and liable as a result of the suit without pausing to find what the party did to become liable.

The only allegation in the complaint relating to the Supreme Court of Virginia reads:

> Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under authority of § 54-48 of the Virginia Code.

There is no contention that the Virginia Court used or threatened to use its enforcement power against Consumer's Union or any member of the Virginia Bar for supplying information to Consumers Union.

Without some finding that the Virginia Court has used its "direct enforcement role" I do not see how it can be held responsible for attorney's fees under the language of the Supreme Court in Consumers Union II.

I find myself totally in agreement with the conclusion of Judge Warriner in his dissent:

> In summary, I believe it is an abuse of discretion to award attorney's fees against the Virginia Court for not doing that which it was not alleged to have done; for not doing that which it was not proved to have

> done; for not doing that which, as against plaintiffs, it could not have done; and for not doing that which, in practice, it rarely does. Such an award would do nothing to further the purposes of § 1988 to encourage "private attorney general" suits. Rather, an award against the Virginia court in its so-called enforcement role, based upon the record in this case, would simply be a determination that the fee should be paid by the Virginia court without regard to the justice of the case. 505 F.Supp. at 829.

For the past three years this suit has been nothing but an effort by the plaintiff's attorneys to establish a theory upon which they could collect a fee. In the spring of 1979 the last possible impediment to gathering the information and publishing the Attorney's Directory for Arlington County was removed. However, when this case was argued in November 1981 the directory had not been printed or distributed. As a result of numerous questions by the court to the attorneys for Consumers Union, the information has been gathered and the directory published. A copy of the directory was forwarded to this court on June 15, 1982. It contains the names of 78 attorneys in Arlington, Virginia. This action has made three trips to the United States Supreme Court, and is presently on its way back to the Supreme Court, all to produce 78 names.

I would affirm the district court's finding that special circumstances rendered a fee award unjust as against the Virginia State Bar for the reasons set forth in the district court's opinion.

I am concerned by and dissent from footnote No. 2 of the majority opinion of this court which seems to indicate that the attorneys are entitled to fees for all services rendered, even those services in pursuing an invalid theory of the law. The district court was very careful to state that the attorney's

fees would be "for services of its counsel in this action in so far as such services were performed to prevent the enforcement of the Rule." It is obvious from the record that these attorneys did not even consider enforcement until this case was almost concluded and then had the matter of enforcement called to their attention by the United States Supreme Court. I am uncertain in reading the majority opinion as to whether the attorney's fees shall be restricted to prevention of enforcement of the Rule or whether the attorneys are to be compensated for all services performed from the beginning of this litigation.

I would remand the case to the district court with instructions to expand the record and determine whether the Virginia Court ever exercised its direct enforcement role.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-1155

Consumers Union of United States, Inc., et al,
versus
Appellees,

Virginia State Bar, et al,
and
Defendants,

Supreme Court of Virginia, et al,
Appellants.

No. 81-1156

Consumers Union of United States, Inc., et al,
versus
Appellants,

Virginia State Bar, et al,
and
Appellees,

Supreme Court of Virginia, et al,
Defendants.

Filed, Dec. 28, 1982, U. S. Court of Appeals, Fourth Circuit

ORDER

Upon consideration of the petitions for rehearing and suggestions for rehearing en banc filed on behalf of the Virginia State Bar, et al, and the Supreme Court of Virginia, et al,

IT IS ORDERED that the petitions for rehearing are denied. Chief Judge Winter and Judge Field voted in favor of the denial and Judge Chapman voted to grant rehearing.

IT IS FURTHER ORDERED that the suggestions for rehearing en banc are denied. Chief Judge Winter, Judge Butzner, who voted before he took senior status, Judge Phillips, Judge Murnaghan, Judge Sprouse and Judge Ervin voted to deny rehearing en banc while Judge Russell, Judge Hall, and Judge Chapman voted to grant rehearing en banc. Judge Widener was disqualified from voting.

Entered at the direction of Judge Field.

For the Court,

/s/ WILLIAM K. SLATE, II

Clerk

CONSUMERS UNION OF UNITED STATES, INC., et al., Plaintiffs,

v.

AMERICAN BAR ASSOCIATION et al., Defendants.

Civ. A. No. 75-0105-R.

United States District Court,
E. D. Virginia,
Richmond Division.

May 8, 1979.

Before BRYAN, Circuit Judge, and MERHIGE and WARRINER, District Judges.

MERHIGE, District Judge.

This matter comes before this 28 U.S.C. § 2281 three judge district court on remand from the United States Supreme Court for "further consideration in light of *Bates v. State Bar of Arizona* [433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810]." *Consumers Union of the United States, Inc. v. Virginia State Bar*, 433 U.S. 917, 97 S.Ct. 2993, 53 L.Ed.2d 1104 (1977). In its order, the Supreme Court vacated this court's prior judgment, reported at 427 F.Supp. 506 (E.D.Va.1976).

The facts of the instant case were stated at length in *Consumers Union of United States, Inc. v. American Bar Association*, 427 F.Supp. 506, 508-512 (E.D.Va.1976), and shall, therefore, be recounted now only briefly. Plaintiffs, Consumers Union of United States; Inc. (hereinafter "Consumers Union") and Virginia Citizens Consumer Council (hereinafter "Consumers Council"), are non-profit consumer organizations which have brought this 42 U.S.C. § 1983 action seeking declaratory and injunctive relief, and

reimbursement from defendants for their costs and attorney fees incurred in prosecuting this action.

Defendants, Virginia State Bar (hereinafter "State Bar"), the Supreme Court of Virginia, Howard W. Dobbins, Rothwell J. Lillard and the Honorable Lawrence W. I'Anson, were all responsible, in varying degrees, for the adoption, interpretation, and/or enforcement of the Code of Professional Responsibility of the Virginia State Bar.[1]

In 1974, plaintiff Consumers Union, through questionnaires, sought to elicit certain information from all Arlington County, Virginia attorneys who were licensed to practice law in Virginia; Consumers Union planned to use the information it received in publication of a directory that was intended to help consumers select and evaluate Arlington County attorneys. Much of the information which Consumers Union solicited and planned to publish in the directory, however, was data which, if disseminated to the public, would violate certain Virginia Code of Professional Responsibility (hereinafter "State Bar Code") Disciplinary Rule 2-102(A)(6) prohibitions on lawyer advertising.

Plaintiffs, recognizing that few, if any, Arlington County attorneys would risk professional disciplinary sanctions by sending information for use in a publication which would violate State Bar Code rules, ". . . seek a declaration that the defendants have violated the First and Fourteenth Amendment rights of the plaintiffs and their members to gather, publish and receive factual information in reference

[1] Plaintiffs also brought suit against the American Bar Association (hereinafter "ABA"). This Court, in its December 17, 1976 opinion and order, dismissed the ABA as a party defendant. After the Supreme Court vacated this Court's opinion and order, and remanded the case for reconsideration in light of *Bates* v. *State Bar of Arizona*, this Court entered an order, filed August 17, 1978 with the agreement of Consumers Union and the state defendants, again dismissing the ABA for the reasons set forth in the prior opinion.

to attorneys practicing in Arlington County, Virginia, and seek additionally an injunction permanently enjoining the enforcement and operation of [State Bar Code Disciplinary Rule 2-102(A)(6)]. . . . Jurisdiction over the action is premised on 28 U.S.C. § 1343(3)." *Consumers Union, supra,* 427 F.Supp. at 508.

First Amendment Claims:

In this Court's previous, now vacated opinion, the majority held that both the non-fee information[3] and the information on attorneys' initial consultation fees which plaintiffs sought to include in their directory was commercial speech protected by the First Amendent, and made applicable to the states through the Fourteenth Amendment. This Court found that State Bar Code Disciplinary Rule 2-102(A)(6) (hereinafter "State Bar Code DR2-102(A)(6)" or "DR2-102(A)(6)") was overbroad and unconstitutionally infringed upon plaintiffs' rights to receive and gather consumer information. The Court therefore permanently enjoined defendants from enforcing the State Bar Rules and Regulations against publishing such information. *Consumers Union, supra,* 427 F.Supp. at 523.

Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), reinforces our prior opinion as to the unconstitutionality of the State Bar Rules' prohibition against publication of both the non-fee information and attorneys' initial consultation fees information at issue in this case. The Court therefore reinstates and reissues its

[3] The non-fee information which plaintiffs seek to include in their directory is the attorney's background, education, legal activities, affiliations, law firm, nature of practice, substantive areas of practice, office hours, knowledge of foreign languages, billing and credit arrangements, and handling of client complaints.

original opinion and order as to these issues. *See Consumers Union, supra,* 427 F.Supp. at 517-523.

Furthermore, in light of *Bates,* this Court holds that plaintiffs are entitled to gather and publish, and their members are entitled to receive, truthful information as to the fees at which the listed lawyers will perform the routine legal services enumerated in plaintiffs' questionnaire.[3]

> The heart of the dispute before us today is whether lawyers may constitutionally advertise the *prices* at which certain routine services will be performed... whether the State may prevent the publication in the newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained....

Bates, supra, 433 U.S. at 367-68, 384, 97 S.Ct. at 2701-2709. (Emphasis in original).

Attorneys Fees:

Plaintiffs have asked this Court to grant them reasonable counsel fees, as well as their costs in prosecuting this action. Defendants have not opposed plaintiffs' motion that defendants be ordered to pay costs.[4] Indeed, it is well established that a federal court may tax costs against state parties

---

[3] The questionnaire asks ". . . information on the average fee charged for a number of common legal services, such as change of name, individual bankruptcy, representation of the complainant in an uncontested divorce, and closing and settlement on the sale of a single-family house." *Consumers Union of United States, Inc. v. American Bar Association,* 427 F.Supp. 506, 511 (E.D.Va. 1976).

[4] ". . . [D]efendants . . . for their response to plaintiffs' motion for an order declaring defendants' liability for fees and costs, say that an award of attorneys fees should be denied for the reasons stated in the attached brief". Defendants' "Response To Motion For an Order Declaring Defendants' Liability For Fees and Costs."

to federal law suits, in the same way that it may tax costs against any other federal court litigant. *See e. g.,* Rule 54(d), Federal Rules of Civil Procedure; *Hutto v. Finney,* 437 U.S. 678, 696, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 77, 48 S.Ct. 97, 72 L.Ed. 168 (1926); *Samuel v. University of Pittsburgh,* 538 F.2d 991, 999 (3rd Cir. 1976).

Defendants do contend, however, that this Court may not, or, in the alternative, should not, allow plaintiffs to recover attorneys fees from defendants. The Civil Rights Attorneys' Fees Awards Act provides that

> . . . In any action or proceeding to enforce a provision of Section . . . 1983 . . . of this Title (42 U.S.C.), . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as *part of the costs.*

42 U.S.C. § 1988 (1976) (emphasis added).

Despite the broad language of 42 U.S.C. § 1988, giving this Court discretion in "any action or proceeding" under 42 U.S.C. § 1983, to allow the prevailing party attorneys fees as part of costs, the state defendants assert that the doctrines of sovereign immunity, judicial immunity, and "good faith" immunity preclude awarding attorneys fees against them. In *Hutto v. Finney,* 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), decided after defendants filed their brief in this case, the Supreme Court held that neither the sovereign immunity nor "good faith" defenses insulate state defendants, when sued in their official capacities, from liability for attorneys fees under 42 U.S.C. § 1988. *See Hutto v. Finney,* at 693-700, 98 S.Ct. 2565.

The only remaining issue raised by defendants as to this court's jurisdiction, under 42 U.S.C. § 1988, to order

that defendants pay plaintiffs reasonable attorneys fees is whether defendants are protected by judicial immunity from such an award. Defendants I'Anson, Dobbins and Lillard, sued in both their official and their individual capacities, are absolutely immune, in their individual capacities, from personal liability for plaintiffs' attorneys fees. "Awards against the official in his individual capacity, in contrast, were not to be affected by the statute (42 U.S.C. § 1988)". *Hutto v. Finney,* 437 U.S. at 700, 98 S.Ct. at 2579. Defendant I'Anson, as Chief Justice of the Supreme Court of Virginia, is clearly immune, in his individual capacity, from all liability —damages, attorneys fees and other costs—for all of his "judicial acts."

> As early as 1872, the Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."

Stump v. Sparkman, 435 U.S. 349, 355, 98 S.Ct. 1099, 1104, 55 L.Ed.2d 331 (1978), *quoting Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1872).

The record reflects that defendant Supreme Court of Virginia has the jurisdiction to adopt, modify, or refuse to modify the Virginia Code of Professional Responsibility. *See* Virginia Code § 54-48 (1974). Chief Justice I'Anson's actions, as a member of the Supreme Court of Virginia, relating to the Court's failure to amend or repeal DR2-102 (A)(6), were clearly judicial acts within the Court's jurisdiction; Chief Justice I'Anson therefore in the instant case enjoys absolute judicial immunity from individual liability for attorneys fees.

Defendants Dobbins and Lillard likewise have absolute immunity, in their individual capacities, for their acts as officers of the State Bar. The State Bar is the state administrative agency through which the Supreme Court of Virginia regulates the practice of law in that state. The State Bar, in recommending rules and rule changes to the Supreme Court of Virginia, and in interpreting those rules for its members, acts both at the direction of the court and as a quasi-judicial body. Its members, in the exercise of those quasi-judicial functions are immune from personal liability. *See Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972).

Defendants State Bar and Supreme Court of Virginia, as well as defendants Dobbins, Lillard and I'Anson, in their official capacities, however, are not immune from liability for attorneys fees. Both the extensive legislative history of 42 U.S.C. § 1988, as well as the numerous court opinions interpreting the statute clearly indicate that all branches and agencies of state governments may be liable for attorneys fees in 42 U.S.C. § 1983 actions.

The Civil Rights Acts, to be effective, depend heavily upon enforcement by private parties such as the instant plaintiffs.

> . . . fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, . . . citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

S.Rep.No.94-1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* [1976] U.S. Code Cong. & Admin. News pp. 5908, 5910.

In *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the Supreme Court recognized that Congress had the power to abolish the common law immunity defenses in actions for damages under 42 U.S.C. § 1983. The Court found, however, that the judicial immunity defense was still viable in 42 U.S.C. § 1983 actions for damages, because the legislative record of 42 U.S.C. § 1983 gave ". . . no clear indication that Congress meant to abolish wholesale all common-law immunities." *Pierson v. Ray*, 386 U.S. at 554, 87 S.Ct. at 1218.

In contradistinction to the silence of the legislative record on common law immunities from damages under 42 U.S.C. § 1983, discussed in *Pierson v. Ray*, the legislative record of 42 U.S.C. § 1988 clearly enunciated Congress's intention to make all common law immunities inapplicable in 42 U.S.C. § 1988 actions for attorney fees.

> . . . *Fee awards are therefore provided in cases covered by S. 2278 (42 U.S.C. § 1988)* in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5. . . [D]efendants in these cases are often State or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

S.Rep.No.94-1011, at 5, U.S.Code Cong. & Admin.News, 1976, at 5913. (Footnotes omitted and emphasis added).

The instant action is one brought under 42 U.S.C. § 1983, a case "covered by" 42 U.S.C. § 1988, and therefore a case in which attorneys fees normally should be awarded to the prevailing plaintiffs. The previously quoted language of the statute itself reinforces this interpretation. "The Act itself

could not be broader. It applies to 'any' action brought to enforce certain civil rights laws." *Hutto v. Finney*, 437 U.S. 678, 694, 98 S.Ct. 2565, 2575, 57 L.Ed.2d 522 (1978).

Furthermore, statements in the congressional record specifically reject extending *Pierson v. Ray* judicial immunity from damages to 42 U.S.C. § 1988 actions for attorneys fees.

> . . .[I]n some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy[17] [citing *Pierson v. Ray*, 386 U.S. 547 (1967)]. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases. . . only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees.

H.R.Rep.No.94-1558, 94th Cong., 2d Sess. 9 (1976).

In light of the clear wording of the statute and the extensive legislative history of 42 U.S.C. § 1988, we hold that this Court has the authority to order the state defendants in this case to pay plaintiffs' reasonable attorneys fees. *See also, Alsager v. District Court*, 447 F.Supp. 572 (S.D.Iowa 1977) (attorneys fees awarded under 42 U.S.C. § 1988 against defendants, including the county court and the county court judge); *White v. Crowell*, 434 F.Supp. 1119 (W.D.1977) (*per curiam*) (three judge district court awarded 42 U.S.C. § 1988 attorneys fees against the State of Tennessee for the state legislature's unconstitutional ad hoc partial reapportionment).[5]

[5] Just as judges have absolute immunity from damages in § 1983 suits for "judicial acts", so too do legislators have absolute immunity from damages for acts performed within their legislative roles. *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951).

Defendants next contend that this Court should exercise its discretion to deny plaintiffs' request for attorneys fees. 42 U.S.C. § 1988 provides that, in any action brought under 42 U.S.C. § 1983, "... the Court, in its discretion, *may allow* the prevailing party ... a reasonable attorney's fee as part of the costs." (Emphasis added).

A court, in exercising its discretion, should ordinarily award reasonable attorneys fees to a prevailing civil rights plaintiff "... unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). This standard is applicable in all 42 U.S.C. § 1988 actions for attorneys fees. S.Rep.No.94-1011, at 4, U.S.Code Cong. & Admin.News, 1976, at 5912; H.Rep.No. 94-1558, at 6 (1976); *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978); *Wharton v. Knefel*, 562 F.2d 550, 557 (8th Cir. 1977).

Defendants site several factors which they contend constitute "special circumstances" which would render unjust an award of attorneys fees to plaintiffs. Defendants first assert that a "special circumstance" is the importance of maintaining the independence of the state judiciary to regulate the practice of law. Awarding attorneys fees in this case, so defendants contend, would promote undue timidity in interpreting those regulations.

We find this argument unpersuasive. All state officials and governmental units subject to 42 U.S.C. § 1983 suits are entrusted with safeguarding citizens' constitutional rights. Those, including defendants, who must exercise discretion in performing their legislative, executive or judicial duties are afforded varying degrees of immunity from damage actions, so that they may exercise that discretion without fear of personal consequences. 42 U.S.C. § 1988 did

not affect the common law immunities from damages, but provided that such immunities would be inapplicable in 42 U.S.C. § 1988 actions for attorneys fees. H.Rep.No.94-1558, p. 9 (1976), *supra.*

If this Court held that defendants were immune from being required to pay plaintiffs' attorney fees, the result would be that private parties with meritorious civil rights claims against governmental defendants would be prevented by the specter of substantial legal costs from bringing civil rights actions for injunctive relief. This is precisely the impediment to private enforcement of the Civil Rights Acts which Congress, through 42 U.S.C. § 1988, sought to eradicate. "If successful plaintiffs were routinely forced to bear their own attorneys fees, fewer aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." H.Rep.No.94-1558 at 6 (1976), *quoting Newman v. Piggie Park Enterprises, Inc., supra.*

Defendants additionally state that it is merely fortuitous that the instant case was pending at the time the 42 U.S.C. § 1988 attorney fee provision was enacted, as the case was tried five months previous to the attorneys fee act becoming law. This argument is irrelevant to any discussion of "special circumstances", however, since Congress clearly intended the act "to apply to all cases pending on the date of enactment. . . ." H.Rep.No.94-1558, at 4, n. 6 (1976), *citing Bradley v. School Board of the City of Richmond,* 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1976); *Hutto v. Finney,* 437 U.S. 678, 695 n. 23, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Burt v. Abel,* 585 F.2d 613, 617 (4th Cir. 1978).

Defendants argument that plaintiffs should not receive attorneys fees because their own staff counsel, and

not outside attorneys, prepared the case, is equally without merit. The Civil Rights Acts provide for awards of attorneys fees to prevailing plaintiffs regardless of whether the plaintiffs' organizational counsel prosecuted the action, or whether the plaintiffs were represented by attorneys of a public interest organization. *See Reynolds v. Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978); *Tillman v. Wheaton-Haven Recreation Association, Inc.,* 517 F.2d 1141, 1147-48 (4th Cir. 1975).

Finally, defendants contend that they should not be ordered to pay attorneys fees because plaintiffs accomplished nothing of any public benefit in the instant case. *See, Zarcone v. Perry,* 581 F.2d 1039 (2d Cir. 1978), *cert. denied,* —— U.S. ——, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); *Naprstek v. City of Norwich,* 433 F.Supp. 1369 (N.D.N.Y. 1977). Defendants claim that the matters on which plaintiffs have prevailed in the instant case add virtually nothing to the holding in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

Defendants' contentions that plaintiffs' suit has resulted in little or no benefit to the public are totally at odds with the facts. Plaintiffs brought this suit because defendant State Bar had ruled that DR2-102(A)(6) made it inappropriate for Virginia lawyers to include their names and information, which this Court has held to be constitutionally protected, in a legal directory. The directory was to be published as a public service to Arlington County area consumers, and was to be sold at its cost of production. As a result of the State Bar's interpretation of DR2-102(A)(6), few, if any, Arlington County lawyers would respond to Consumers Union's questionnaire.

Not only was the public deprived of constitutionally pro-

tected information at the time this suit was instituted, but the deprivation continues to this day.

Defendant Supreme Court of Virginia still has not amended the Virginia Code of Professional Responsibility to conform to the requirements of the Constitution as enunciated in *Bates,* and the Consumers Union directory has yet to be published. In December, 1978, a Virginia Beach, Virginia attorney was indicted under two Virginia statutes for publication of an advertisement that was virtually identical to the advertisement which the Supreme Court in *Bates* found constitutionally protected, but which DR2-102(A)(6) still prohibited. The chilling effect of DR2-102(A)(6) on First Amendment freedoms is yet extant, even if not subject to objective calculations.

Recognizing, as discussed earlier, that good faith is not a defense to 42 U.S.C. § 1988 liability for attorneys fees, nonetheless special circumstances would make unjust any award of attorneys fees against defendant State Bar or against defendants Dobbins and Lillard in their official capacities as State Bar officers. The Supreme Court of Virginia, and not defendants State Bar, Dobbins or Lillard, has the power to change the State Bar Code disciplinary rules. The record reflects that defendant State Bar and its appropriate officers endeavored to persuade the Supreme Court of Virginia to amend DR2-102(A)(6) to conform to what they deemed to be constitutional guidelines. Defendant Lillard presided over a committee of the Virginia State Bar which recommended to the State Bar council that DR2-102(A)(6) be amended; defendant Dobbins presided over the State Bar council which petitioned the Supreme Court of Virginia to change DR2-102(A)(6). Despite these entreaties, the Supreme Court of Virginia declined to amend

DR2-102(A)(6). Under these particular facts, it would be unjust to require the State Bar defendants to pay plaintiffs' attorneys fees. *See Chastang v. Flynn and Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976).

Similar circumstances, however, are not present to make unjust an award of attorneys fees against the Supreme Court of Virginia in its official capacity, and defendant Chief Justice I'Anson in his official capacity. The Supreme Court of Virginia has yet to amend State Bar Code DR2-102(A)(6) to conform with the clear constitutional requirements of *Bates*—a decision handed down June 29, 1977, more than twenty months ago. Indeed, this district court, in the interest of comity has delayed the instant opinion to the point that any further delay would be, as we view it, dereliction of our responsibilities.

The Supreme Court of Virginia, too, denied defendant State Bar's petition to amend DR2-102(A)(6) to conform with the American Bar Association proposals and the perceived constitutional requirements of *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), a case which set forth certain First Amendment protections for commercial speech. It would hardly be unjust to order the Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend State Code DR2-102(A)(6) to conform with constitutional requirements.

Counsel for the Supreme Court of Virginia defendants and counsel for plaintiffs will be directed to attempt to reach an agreement on a reasonable sum as plaintiffs' attorneys fees, and to submit any such agreement to this Court. In the event the parties fail to reach agreement, this Court shall determine an appropriate sum to which plaintiffs are entitled.

WARRINER, District Judge, dissenting in part and concurring in part.

I agree with the decision of the majority that special circumstances render an award of attorneys' fees against the Virginia State Bar unjust. I believe, however, that the majority has misapprehended the nature of the immunity enjoyed by defendant Virginia Supreme Court in this matter, and so I respectfully dissent from the award of attorneys' fees against that defendant.

I

Central to the majority's analysis is the proposition that an award of fees is authorized in this case by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereinafter called the Act), because Congress in passing that Act specifically intended to abrogate judicial immunity from awards of attorneys' fees. I do not believe, however, that this question need be reached because it is my view that the immunity enjoyed by the Supreme Court under the facts of this particular case is legislative immunity and not judicial immunity.

Plaintiffs in this action sought a declaratory judgment that certain rules prescribed by the Supreme Court for the governance of the professional conduct of attorneys-at-law were unconstitutional, and for an injunction against the enforcement of those rules. The Supreme Court of Virginia was made a party to this action by virtue of the fact that it "adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code." Complaint at p. 4. No other cause of action is alleged against the Supreme Court of Virginia. Thus, it is for the act of adopting and promulgating DR2-102(A)(6) that the Supreme Court of Virginia was made a party

to this action and for which the majority now holds it liable for attorney's fees.

In enacting the disciplinary rule challenged in this law suit, the Supreme Court of Virginia acted pursuant to the authority granted to it in Va.Code § 54-48(b) (1978 Repl.)[1] That section specifically empowers the Supreme Court to prescribe a code of ethics for attorneys-at-law. This Court has previously indicated that the Supreme Court of Virginia acts in a legislative capacity in adopting disciplinary rules. *Hirschkop v. Va. State Bar*, 421 F.Supp. 1137, 1156 (E.D.Va.1976), *rev'd on other grounds*, 594 F.2d 356 (4th 1979). This view is readily supported by analysis. Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.

I now face the problem of whether the Supreme Court of Virginia, acting in a legislative capacity, enjoys legislative immunity. There is no doubt that it does. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, —— U.S. ——, 99 S.Ct. 1171, 59 L.Ed.2d 461 (1979), the Supreme Court held that the appointed members of a

[1] § 54-48. *Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure.*—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

* * * * *

(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

governing body of a regional planning agency were entitled to legislative immunity against a suit for damages under 42 U.S.C. § 1983. The Supreme Court in *Lake Country Estates* rejected a narrow, formalistic view of legislative immunity in favor of a view that legislative immunity was to be accorded where the function complained of was a legislative function. The Court said: "[T]o the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they were entitled to absolute immunity from federal damage liability." —— U.S. at ——, 99 S.Ct. at 1180.

In so holding, the Supreme Court followed closely the reasoning of *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), which teaches that it is the function of the official, and not his title, which controls the nature of his immunity. In *Butz*, the Supreme Court held that employees of the Executive Branch serving as administrative law judges and hearing examiners for administrative agencies enjoy judicial immunity. The Court reached this conclusion by an analysis of the work of hearing examiners and administrative law judges finding their role was "functionally comparable" to that of a judge. The Supreme Court also held that agency officials performing functions analogous to those of a prosecutor should be able to claim the prosecutorial immunity established by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d. 128 (1976). The Court spoke of the functions of such officials being very much like the functions of a prosecutor in a criminal law context.

In *Briggs v. Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10 (1977) the question presented was whether a prosecutor was entitled to the absolute immunity accorded him in

his quasi-judicial status under *Imbler*, or whether he was merely entitled to the qualified immunity typically conferred on other investigative officers. The court held in *Briggs* that the prosecutor was not entitled to absolute immunity because the act on which the suit was based was not one done in the course of exercising prosecutorial discretion. Thus, the quality of the immunity depended not upon the title of the officer but instead upon the nature of the function being discharged. This distinction was earlier recognized by the Fourth Circuit in *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973). There a State lieutenant governor was found to be entitled to legislative immunity when he was acting as president of the State senate.

This analysis is, of course, nothing more than a common sense approach to the question of official immunity. These immunities are the creatures of public policy, and depend necessarily upon the function being performed by the official when he does the acts for which he is called upon to answer. The title of the office in no way determines the scope and character of the privilege enjoyed by the incumbent. Thus, the fact that the Supreme Court of Virginia is comprised entirely of judges does not determine the scope and character of the privilege enjoyed by the Supreme Court when it enacts disciplinary rules. If the function is legislative, then the applicable privilege is the legislative privilege.

II

To properly understand the scope and nature of legislative immunity one must examine its origin and purpose.

According to Chief Justice Warren, "absolute legislative

privilege dates back to at least 1399." *Barr v. Matteo*, 360 U.S. 564, 579, 79 S.Ct. 1335, 1343, 3 L.Ed.2d 1434 (1959) (Warren, C.J., dissenting). During the struggle between Parliament and Crown in the 17th Century the privilege of those engaged in legislating to be free of the fear of arrest or civil process as a result of their legislative activity crystalized. The Bill of Rights which followed the Glorious Revolution of 1688 established the privilege unequivocally. "That the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament." W. and M. 2, c. 2, (1689).

The tradition of legislative immunity was equally strong in the Colonies. It was embodied in Article V of the Articles of Confederation and Article 1, § 6 of the Federal Constitution. *Tenney v. Brandhove*, 341 U.S. 367, 372, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). Today, most state constitutions, including that of Virginia, establish this legilsative immunity. Va.Const. art. IV, § 9.

Tenney, in its explanation for reaffirming state legislative immunity, quotes from the works of James Wilson, an influential member of the committee which was responsible for incorporating legislative immunity into the Federal Constitution.

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence. II Works of James Wilson (Andrews ed 1896) 38. *Tenney*, 341 U.S. at 373, 71 S.Ct. at 786.

Tenney also quotes with approval an explanation of the privilege expounded by Chief Justice Parsons in *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) in the early 19th century.

> These privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecution, civil or criminal. I therefore think that the Article ought not to be construed strictly, but liberally, that the full design of it may be answered. *Tenney*, 341 U.S. at 373-74, 71 S.Ct. at 787.

This understanding that the broad application of legislative immunity is central to the proper functioning of representative government is one that arose in the midst of ancient parliamentary struggles and has been unquestioned in this country since the Revolution. It is a privilege which inures to the benefit of all of us. Legislative functions not free from the specter of judicial penalty and sanction cannot truly represent the wishes of the people. As noted by Justice Frankfurter, "[o]ne must not expect uncommon courage even in legislators." *Tenney*, 341 U.S. at 377, 71 S.Ct. at 788. Legislators, being human, would be inhibited by the specter of penalty and sanction. It is to free the people's representatives[2] from such inhibiting effect that the privilege exists.

There is another fundamental basis for legislative immunity. This is the deeply imbedded doctrine of "separation of powers." The central place that legislative immunity holds

[2] As *Lake Country Estates*, —— U.S. at ——, 99 S.Ct. at 1179, makes clear, legislators need not be elected directly by the people to enjoy legislative immunity. They may be appointed, as in *Lake Country Estates*, or, as here, elected by the Virginia General Assembly. Va.Const. art. VI, § 7.

in preserving effective separation of powers has been noted in Ervin, *The Gravel and Brewster Cases, An Assault on Congressional Independence*, 59 Va. L.R. 175, 181 (1973). Senator Ervin's article reiterates the historic basis and present necessity for a broad reading of legislative immunity and reminds us of its fundamental importance to our scheme of government.

The important role that legislative immunity plays in preserving separation of powers could not be better stated than it was by the Supreme Court in *United States v. Johnson*, 383 U.S. 169, 178-79, 86 S.Ct. 749, 754, 15 L.Ed.2d 681 (1975).

> In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders. . . . The legislative privilege, protected against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for insuring the independence of the legislature.

Two crucial purposes then are served by legislative immunity: preservation of free and unhampered debate and decision making by the representatives of the people, and separation of powers among the various branches of government.[3]

---

[3] The appeal to separation of powers as a basis for immunity is not a mere shibboleth or talisman. Despite the majority's undoubted adherence to the principle of separation, a substantial portion of the majority opinion is spent complaining about the defendants' failure to promptly amend the offending rule after its constitutionality was implicated by *Bates*. The clear inference to be drawn from the majority plaint is that had the defendant, in its legislative capacity, bowed to the will of the courts, then they would not have been "punished" by the imposition of counsel fees, euphemistically labeled "costs."

III

Case law has established that the common law legislative immunity applicable to State legislators and the constitutional legislative immunity that Congress enjoys by virtue of the speech and debate clause are the same in scope. *Tenney,* which reiterated the ancient doctrine of common law legislative immunity and which serves as the modern landmark for any discussion of its scope and application, treats the constitutional and common law forms of legislative immunity identically. Its treatment of the history of the immunity illustrates that the constitutional immunity is an outgrowth and, in essence, is the constitutional embodiment of the common law privilege. *Tenney* discusses the constitutional and common law immunity interchangeably in applying the legislative immunity to members of the California legislature. Again, in discussing "the doctrine of legislative immunity, having its root as it does in the speech and debate clause of the Constitution," the Supreme Court looks to *Tenney* to define the scope of such immunity. *Dombrowski v. Eastland,* 387 U.S. 82, 84-85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967).

The Fourth Circuit has specifically held that the constitutional privilege has been extended to State legislators. In *Eslinger,* 476 F.2d at 228, the Court held that South Carolina legislators enjoy the same absolute legislative immunity as do members of Congress, extending even to immunity from suit itself. *U. S. v. Dowdy,* 479 F.2d 213, 226 (4th Cir. 1973) also treats constitutional and common law legislative immunity identically. The Sixth Circuit in *United States v. Gillock,* 587 F.2d 284, 286 (6th Cir. 1978) takes a similar position.

Only the Third Circuit, in the factual context of requiring Pennsylvania State legislators to obey a subpoena duces

tecum issued by a federal grand jury investigating racketeering, makes a distinction between the immunity enjoyed by members of Congress and that enjoyed by State legislators. *In re Grand Jury Proceedings,* 563 F.2d 577, 581 (3rd Cir. 1977). It is beyond argument that this Court is bound by *Tenney* and *Eslinger* as controlling authorities, not a Third Circuit case in a different factual context. Accordingly, I believe that the scope of common law legislative immunity is identical to that of constitutional legislative immunity and that those legislating for the Commonwealth enjoy the same privileges in this regard as members of Congress.

Legislative immunity is the broadest sort of immunity. As Justice Frankfurter noted in *Tenney:* "the privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience of distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney,* 341 U.S. at 377, 71 S.Ct. at 788. The well-grounded fear of those who fought for and preserved legislative immunity is that those performing legislative functions, being merely human, might retreat from taking daring, innovative, or unpoplar positions or, by contrast, might falter in adhering to long held principles, if faced with the "inconvenience and distractions of a trial."

As noted in the per curiam opinion in *Dombrowski,* 387 U.S. at 85, 87 S.Ct. at 1427:

> It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the speech and debate clause of the Constitution, *Kilbourn v. Thompson,* 103 U.S. 168, 204, 26 L.Ed. 377 (1881) that legislators engaged in the sphere of legitimate legislative activity, *Tenney v. Brandhove, supra,* 341 U.S. at 376, 71 S.Ct. 783, should be protected not only from

> the consequences of litigation's results but also from the burden of defending themselves.

The Supreme Court has recently reiterated this broad sweep of legislative immunity in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503, 95 S.Ct. 1813, 1821, 44 L.Ed.2d 324 (1975).

> Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the speech and debate clause is an absolute bar to interference.

The breadth of the immunity cannot be surpassed and the importance of its broad scope has been continually reiterated. There is no injunction—damages dichotomy. Neither form of relief is available. The Fourth Circuit understands this. In *Eslinger*, 476 F.2d at 228-30, the Court, while holding an employee of the South Carolina legislature liable to suit though immune from damages, held that the president pro tempore, various State senators, and the lieutenant governor were absolutely immune from suit, for injunctive relief as well as for damages.

The Supreme Court has not only continually reiterated this broad scope of legislative immunity but has explained it in terms of its origin. Legislative immunity is wholly

different from judicial and executive immunity. In *Scheuer v. Rhodes,* 416 U.S. 232, 239-50, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) the Court discussed the different origins of each of the three types of immunities applicable to the different branches of government; legislative immunity, judicial immunity and executive immunity. It noted that executive immunity has traditionally been the most limited form while legislative immunity is absolute. In discussing the related subject of privilege from libel actions, Chief Justice Warren noted that "[t]he history of the privileges conferred upon the three branches of government is a story of uneven development. Absolute legislative privilege dates back to at least 1399.... The absolute immunity arising out of judicial proceedings existed at least as early as 1608 in England. But what of the executive privilege?" *Barr v. Matteo,* 360 U.S. 564, 579-80, 79 S.Ct. 1335, 1343-1344, 3 L.Ed.2d 1434 (1959) (Warren, C.J., dissenting).

IV

The majority opinion in this case quotes from the Senate Committee report as follows:

> [D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party). S.Rep.No.94-1011, at 5, U.S.Code Cong. & Admin. News, 1976, at 5913. (Footnotes omitted).

This language indicates that Congress intended for governmental officials who have been held liable for attorneys'

fees to turn to the government that employs them to pay the needed money. Does this intention not to make the officials sued personally liable negate either the reasons for legislative immunity or the necessity that such immunity be of the broadest scope? I do not believe so.

That the Senate Report intends that officials liable for attorneys' fees be able to turn to their employer agency or government for succor does not guarantee that such help will be in all instances forthcoming. Thus legislators would not be certain of being able to turn to the State for the needed money and the inhibiting effect on them, deplored by all who enshrined the privilege in our jurisprudence, would be present. And as recently noted by the Supreme Court in *United States Servicemen's Fund*, 421 U.S. at 503, 95 S.Ct. 1813, the mere liability of the legislator to the annoyance of suit, not just the ultimate payment of money, has a disruptive and inhibiting effect on legislators. Even if the congressional committee envisions a "pass-through judgment" State policy may not willingly fall in line. *See, Hutto v. Finney*, 437 U.S. 678, 682, 98 S.Ct. 2565, 2570, 57 L.Ed.2d 522, 546 at n. 7 (Powell, J., dissenting) and at 550-1 (Rehnquist, J., dissenting) (1978). And if the State does comply with the federal vision, legislators would undoubtedly be subject to influence to avoid incurring the expense. Thus directly or indirectly the judiciary would hold unwonted sway over legislators. That such inhibiting effects are likely even if the government ultimately pays the judgment for attorneys' fees is sufficient to convince me that the centuries old policy reason for legislative immunity is not to be negated by any congressional intent to ultimately shift the payment burden to the State.

The fact that the legislator may turn to the State to col-

lect the money to pay the plaintiff's attorneys' fees also in no way lessens the separation of powers rationale for the immunity. Whoever ultimately pays the attorneys' fees, the dangers inherent in a judicial ordering of such payment remains. Thus, whether Congress intended the legislator to pay the attorneys' fees or the State treasury to ultimately bear the burden, the policy behind legislative immunity and the necessity that such immunity be absolute would be severely impaired.

Historically, the broadest application of legislative immunity has been extended to those doing the legislating. In *Kilbourn, Tenney, Dombrowski, United States v. Brewster,* 408 U.S. 501, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972) and *United States v. Gravel,* 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d. 583 (1972), the Supreme Court has recognized that those who are not legislating, *e. g.,* employees of the legislative branch, do not enjoy the same expansive scope of immunity enjoyed by legislators. Recently, however, in *United States Servicemen's Fund,* 421 U.S. at 507-508, 95 S.Ct. 1813, the Court extended absolute legislative immunity to the chief counsel of a legislative committee. The Court noted that aides who are essential to the legislative process are equally immune with those doing the legislating.

No matter what the scope of protection afforded to aides to legislators, it is the Justices of the Supreme Court of Virginia in this case who have legislated and who are named as parties defendant. The full scope of legislative immuntiy applies to the Justices when acting in their legislative capacity, as here. Accordingly, I would hold that the Justices of the Supreme Court are entitled to legislative immunity, which is absolute, in this action.

V

Since the majority believed this to be a case involving judicial immunity, it did not deal with the Act *vis-a-vis* legislative immunity. The Act reads as follows:

> In any action or proceeding to enforce a provision of [42 U.S.C. §§ 1981-1983, 1985, 1986, 20 U.S.C. §§ 168 *et seq.*] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Since I hold that defendants were clothed with legislative immunity it is necessary that I address the question: Does this statute abrogate legislative immunity?

The question involves, inter alia, fathoming the intent of Congress when it enacted the statute. *Tenney,* in considering the impact of 42 U.S.C. § 1983 on legislative immunity, looked to the intent of Congress when it passed the Civil Rights Act of 1871. Here we must look to the intent of Congress when it passed the Civil Rights Attorney's Fees Award Act. I think Congress neither intended to abrogate legislative immunity nor had any reason to do so since legislative immunity does not frustrate any congressional objective embodied in the Act.

The words of the statute itself say nothing about immunities, legislative or otherwise. However, as my purpose is to discern the intent of Congress, I have searched the debates and committee reports for the light they throw on Congress' intent.

The only portion of the legislative history which directly mentions immunities is in the House report from the Committee on the Judiciary. On page 9 the report reads as follows:

> Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17]

Footnote 17 reads as follows:

> *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). H.Rep.No.94-1558, at 9, 1976.

This language establishes that the House Judiciary Committee believed that the language of the bill would, to some extent, override immunities. The only indication of which immunities the House Judiciary Committee had in mind is furnished by the cases noted in footnote 17.

Wood dealt with the immunity enjoyed by school officials, in particular school board members. In deciding the proper scope of their immunity, the Supreme Court was considering the proper scope of executive immunity. The opinion in *Wood* specifically distinguished executive immunity from the stronger legislative and judicial immunities. *Wood*, 420 U.S. at 316-17, 95 S.Ct. 992.

In *Scheuer* the Court was again construing the proper scope of executive immunity. The Court specifically noted that legislative immunity is far stronger and more encompassing than executive immunity. *Scheuer*, 416 U.S. at 240-41, 94 S.Ct. 1683.

Finally, the House Judiciary Committee report cites *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). *Pierson* dealt with the scope of immunity appropriate to judges acting in their judicial capacity and to police officers acting in their executive capacity. *Pierson* does not consider or mention the matter of legislative immunity. Thus the cases cited by the committee not only did not deal with legilsative immunity, two out of three specifically called attention to the fact that legislative immunity is qualitatively different from executive and judicial immunity.

It must be recalled from the discussion above that legislative immunity is qualitatively different from the other immunities; it serving as a shield from suit itself. *United States Servicemen's Fund*, 421 U.S. at 503, 95 S.Ct. 1813; *Dombrowski*, 387 U.S. at 85, 87 S.Ct. 1425. And it can only be assumed that Congress, itself entitled to the immunity, understood this when legislating and would not have abrogated such a privilege by a non-specific reference in a committee report.

There are other indications from the congressional debates that the radical change required for plaintiffs to recover was not intended by the Congress. Senator Kennedy, sponsor of the legislation, explained its purpose as restoring the law to its "pre-*Alyeska*" *state.*[4] *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Specifically Senator Kennedy noted, "This bill would close a series of loopholes in our civil rights laws created by the Supreme Court's *Alyeska*

[4] It is interesting to note that the Supreme Court considered the question in *Alyeska* to be whether it should formulate new law concerning attorneys' fees or whether it should affirm the "American" rule. The Court chose not to change the law and re-affirmed the traditional "American" rule. *Alyeska*, 421 U.S. at 277, 95 S.Ct. 1612.

decision last year". 122 Cong.Rec. S 516251-52 (1976). This was echoed by Senator Mathias, Republican member of the Senate Judiciary Committee and a strong supporter of the legislation. Senator Mathias noted that,

> The need for this bill arises from a recent Supreme Court decision which has erected a formidable financial barrier against those seeking access to Federal courts and has consequently dealt a serious blow to the effective enforcement of our civil rights laws . . . I believe that S. 2278 [the legislation in question] constitutes a much needed response to *Alyeska* and is necessary to guarantee the proper enforcement of our civil rights laws which the Congress has so earnestly labored for in the past. 122 Cong.Rec. S. 16251 (1976).

Reading through the House and Senate debates as well as the House and Senate committee reports gives me the clear impression that the purpose of the legislation was to return the law to what Congress considered it to be prior to *Alyeska*.[5] Had Congress intended to do more, there would be evidence in the record.

There is no logical reason for Congress to have intended to override legislative immunity because no objective that Congress had in mind when it passed the Civil Rights Attorney's Fees Awards Act is frustrated by legislative immunity. Congress intended to encourage the private enforcement of the civil rights statutes. 122 Cong. Rec. S 16252 (1976).

The failure to enforce civil rights laws and the enforcement of laws and customs which violate civil rights is activ-

[5] See: S.Rep.No.94-1011, at 1, 4, 1976; 121 Cong.Rec. S 14975 (1975); 122 Cong.Rec. S 16251, S 16252, S 16254, S 16431, S 16432, S 16492, S 16664, S 17052 (1976); H.Rep.No.94-1558 at 2, 1976; 122 Cong.Rec. H 12150, H 12151, H 12154, H 12155, H 12159, H 12160, H 12161, H 12162, H 12163, H 12164, H 12165 (1976).

ity, or lack thereof, engaged in by those enforcing the laws or those interpreting the laws; that is, those acting in an executive or judicial capacity. Here, it is the Virginia State Bar that has acted to enforce the law. So in all cases there must be someone enforcing the law, or failing to, and it is that enforcing official who may properly be sued. Thus, the vindication of civil rights by private enforcement that Congress intended is accomplished by suit against those acting in an executive and, sometimes, judicial capacity. Even where a law is on the books which is not being enforced but the possibility of enforcement chills the exercise of rights, it is the official with the power to enforce who can give the plaintiff the relief be seeks: assurance against enforcement. Thus the absence of a right to counsel fees against those acting in a legislative capacity in no way negates what Congress intended. Accordingly, there is no logical reason to assume, especially since no other indications are present, that Congress intended attorneys' fees to be collected against those who enacted the law no matter what their motive.

In summary, there is no specific language in the statute that evidences any intent on the part of Congress to abrogate legislative immunity, no indication that the language of the House Committee Report applies to legislative immunity, no indication that Congress intended to do more than return the law to what it considered it to be prior to *Alyeska,* and no policy reason for awarding attorneys' fees against those acting in a legislative capacity since plaintiffs can in a proper case be awarded fees from the executive officials who are depriving plaintiffs of their rights. Accordingly, I am convinced that Congress did not intend to abrogate legislative immunity in regard to the award of attorneys' fees.

That Congress' intent was not to abrogate legislative immunity in this case is bolstered by my opinion that to do so could raise a constitutional question. In *Tenney*, Justice Frankfurter raised that constitutional question. "Let us assume, merely for the moment, that Congress has constitutional powers to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption." *Tenney*, 341 U.S. at 376, 71 S.Ct. 783. I do not think that this Court should make that "big assumption" nor can I assume that Congress intended to raise that question when passing the Act. Had Congress thought that the Act raised constitutional problems by abrogating legislative immunity the subject would most likely have arisen somewhere in committee or on the floor.

Just this term in *NLRB v. Catholic Bishop of Chicago*, —— U.S. ——, ——, 99 S.Ct. 1313, 1319, 59 L.Ed.2d 533, 541 (1979), the Supreme Court again emphasized that only when "the affirmative intention of Congress clearly expressed" requires a constitutional resolution, should the courts assume there is a constitutional question. Unless the congressional interest necessarily raises a constitutional issue, the enactment should be construed in such a way as to avoid any conflict between the statute and the Constitution. In *Catholic Bishop of Chicago*, —— U.S. at ——, 99 S.Ct. at 1322, 59 L.Ed.2d at 545, the Court said, "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Catholic Bishop of Chicago*, —— U.S. at ——, 99 S.Ct. at 1322, 59 L.Ed.2d at 545. So here I think we should construe the Civil Rights Attorney's Fees Awards Act in a manner that avoids raising a constitutional issue involving legislative immunity. Accordingly, for the addi-

tional reason that to hold otherwise would raise a constitutional issue, I am convinced that Congress evinced absolutely no intention of abrogating legislative immunity by the passage of this statute.

VI

I believe that the above discussion amply demonstrates that the Supreme Court of Virginia is immune from an award of attorneys' fees in this action by reason of its legislative immunity. I believe that the foregoing discussion represents accurately the state of the law on this question. However, the Supreme Court of Virginia has never raised its legislative immunity as a bar to suit in some four years of litigation in this case. If the failure so to raise legislative immunity constitutes a waiver of that defense, then the Supreme Court may be held liable for attorneys' fees despite its immunity as described above.

Two considerations militate against a waiver in this case. First, I believe that the legislative immunity which protects the Supreme Court in this action "sufficiently partakes of the nature of a jurisdictional bar" that it may and should be raised by this Court *sua sponte*. *See Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361 (9th Cir. 1967), *rev'd. in part and aff'd. in part sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, —— U.S. ——, 99 S.Ct. 1171, 59 L.Ed.2d 461 (1979). I have already discussed the nature of legislative immunity and have shown how legislative immunity differs in quality from both executive immunity and judicial immunity. Legislative immunity is grounded in the nature of the relationship between the coordinate branches of government in our republican system, whether on the federal or State level. Legislative immunity, as I have

shown, is immunity from suit and not merely immunity from damages. In this way, it partakes of a jurisdictional bar and can be raised at any time in the litigation of the case, and may also be raised *sua sponte* by the court at any time.

The second reason that I am reluctant to find a waiver in this case is that legislative immunity is one which belongs to the public and is designed for the protection of the public. The policy which underlies legislative immunity has been explored at length above. It is my view that such an important immunity, rooted in the ancient precepts of the common law, embodied in the federal Constitution, and so necessary to the orderly functioning of a republican form of government, may not be waived by inadvertence or mistake. It is of such a nature that it may be waived only by a willful, knowing, and deliberate act of waiver. It appears that legislative immunity was not raised by the defendant Supreme Court of Virginia simply because the possibility of the highest court of the State invoking legislative immunity did not occur to those to whom the defense of this action was entrusted. This cannot be described as a knowing, willful, and deliberate waiver.

Furthermore, in *Eslinger*, 476 F.2d at 228, the Fourth Circuit rejected an argument that the defendants had waived their immunity by their failure to allege it formally in their answers to the complaint and the amended complaint. Thus, there is no requirement that legislative immunity be raised in the pleadings. It is sufficient that the question of immunity be raised before the trial court. 476 F.2d at 228. It is my view that in raising judicial immunity, which the Supreme Court did with vigor, the Supreme Court placed the question of its immunity squarely before this Court. The defense raised was one of immunity. The authority cited, according to the majority, did not support the immunity

claimed, but other authority existed that amply supports the immunity to which defendant is entitled. It would be extremely harsh for this Court to hold the Supreme Court of Virginia to some sort of election of defenses with respect to immunity. Accordingly, I believe that the Supreme Court should not be held to have waived its legislative immunity in this case.*

VII

I have heretofore indicated my reasons for believing that the Supreme Court of Virginia should not be required to pay plaintiff's attorneys' fees in this case. I have concurred in the majority view that the Virginia State Bar should not be held liable. The final question which remains is whether or not this Court is empowered to award attorneys' fees directly against a State in a case where such an award against the agency or officials of the State involved in the law suit is not appropriate, and in which the State itself is not a party.

This question arises out of some remarkable dicta found in the five-man majority opinion in *Hutto v. Finney*, 437 U.S. 678, 700, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978). In *Hutto*, the Supreme Court affirmed an award of attorneys' fees against certain named officials of the Arkansas Department of Corrections. After discerning that it was "obvious" that the award would be paid with State funds, the majority went on to indicate that the Arkansas Department of Corrections, a non-party, was the entity intended by Congress to bear the burden of the award.

The *Hutto* result was reasoned from the language of the

* Since I would hold that the Supreme Court of Virginia has not waived its legislative immunity, the Supreme Court of Virginia should be dismissed from this action entirely. I therefore dissent from the entry of any order against the Supreme Court, and I would dismiss the Supreme Court as a party to this action with its costs.

Senate committee report relied on by the majority in this case. In addition, the *Hutto* majority discussed as a basis the distinction between one sued in his official capacity and in his individual capacity. From these, the Supreme Court determined that Congress intended a non-party Stage [sic] agency, or the State itself, to be liable for counsel fees incurred by errant officials.

Though the distinction between a person's official capacity and his individual capacity is not so obvious to me as it is to Mr. Justice Stevens, I acknowledge that this inferior court must apply the reasoning of *Hutto* in a proper case. But *Hutto* is not this case.

There, the State of Arkansas was held liable for attorneys' fees in a derivative manner: defendant State official Hutto was legally liable, ergo the State was legally liable. In this case legislative immunity prevents the award of attorneys' fees against the Supreme Court of Virginia. Applying the principle of *Hutto,* that the State is derivatively liable for the activities of its officers, leads me to conclude that the Commonwealth cannot be held liable for attorneys' fees when the defendant Supreme Court of Virginia cannot be held liable. *Hutto* stands for the proposition that *if* the Supreme Court of Virginia were liable, the Commonwealth, even though a non-party, would be liable. Accordingly, I believe that *Hutto* does not require or allow this Court to award attorneys' fees against the Commonwealth when this Court does not have the power to award attorneys' fees against the Supreme Court of Virginia.

I have already discussed my view that an award of attorneys' fees against the State on account of purely legislative activity is utterly inconsistent with the concept of legislative immunity. Just as Congress did not intend to disturb legislative immunity in passing the Act, so it did not intend to

permit awards of attorneys' fees against States on account of legislative activity. It is true that in *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn. 1977), a case cited by the majority, the Court awarded attorneys' fees against the State of Tennessee for a purely legislative act; a change in the apportionment of State legislative districts. It is not clear from the opinion whether the State of Tennessee was a named party defendant. The only named defendant which can be found in the report of the case is the Secretary of State of Tennessee. *White* is entirely devoid of reasoning to support an award of attorneys' fees against a non-party for purely legislative activities, and I do not believe it is a very instructive case.

Nor do I believe that the Commonwealth of Virginia may properly be held liable for attorney's fees where the Court has already found that special circumstances make an award of fees against the Virginia State Bar unjust. I agree with the holding of the majority that in the absence of special circumstances the Virginia State Bar would be liable for attorneys' fees. It may very well be that the Commonwealth of Virginia would have to pay such fees if awarded, and I do not doubt that the Commonwealth would in fact pay such a fee if ordered to do so by this Court. However, I believe that the Commonwealth is entitled to the benefits of the proper behavior of its officers and agencies just as it is subject to liability for their unlawful behavior. As I have explained above, I do not believe that anything in either *Hutto* or in the legislative history of the Act, properly understood, is intended to subject States to awards of attorneys' fees unless some agency or official of the State is first held liable. Accordingly, as special circumstances render an award against the State Bar unjust, such an award against the State would not be proper.

In conclusion, I believe legislative immunity does not allow this Court to award attorneys' fees against the Supreme Court of Virginia. Special circumstances make such an award against the State Bar unjust. *Hutto* and the legislative history allow an award against a State only when some official or agency of the State is first held to be liable. No official or agency of the State can be held liable for counsel fees in this case. The Commonwealth, therefore, cannot be held liable.

VIII

Finally, I would hold that, even if the Court were empowered to award attorneys' fees against the Supreme Court of Virginia, special circumstances render such an award in this case unjust. There is not now nor has there ever been any appropriate suggestion that any of the defendants acted in bad faith in enacting the Rule or with regard to any aspect of this litigation. While it is scarcely necessary to emphasize here that a finding of bad faith is not necessary to an award of attorneys' fees, a party's good faith is nevertheless a factor which the Court may consider in determining whether an award of fees is appropriate.

Here, the majority frowns upon the Supreme Court for its failure to amend DR2-102(A)(6) to conform with certain ABA and VSB proposals and for its failure to amend the rules since the decision in *Bates*. It is my view that this language in the majority's opinion represents a stark example of the dangers inherent in any relaxation of the ancient rule of legislative immunity. The majority has taken it upon itself to criticize the Supreme Court of Virginia for its failure to conform to the majority's idea of the course a lawmaking body should follow. The majority appears to be applying a bad faith standard to the Virginia Supreme Court when it

declares that it will order the Supreme Court to pay attorneys' fees because of "their continued failure and apparent refusal to amend State Code DR2-102(A)(6) to conform with constitutional requirements." Majority op. at 1069. This kind of inquiry by the courts into the legislative process is inimical to the separation of powers and the republican form of government and precisely the kind of behavior which absolute legislative immunity is intended to avoid.

Despite the appearance of a bad faith standard, I do not believe that the majority intended to imply that the Supreme Court of Virginia is guilty of bad faith in this matter. The questions surrounding advertising by attorneys are grave questions of public policy. They are not simple and they are not cut and dried. When confronted with the constitutional challenge to these regulations, this Court responded with three separate opinions and the Supreme Court responded with four separate opinions. No one pretends that the Supreme Court's opinion in *Bates* answered all of the questions which exist with respect to the proper scope of State regulation. Under these circumstances, I do not believe that the failure of the Supreme Court of Virginia to act in 1976, or its failure to act since June 1977, in any way bears upon the justness of an award of fees against that Court.

In my view, such an award would be extremely unjust. The ban on professional advertising by lawyers is time honored. It was embodied in Canon 27 of the *Canons of Professional Ethics of the American Bar Association* in 1908. This Canon remained essentially unchanged, though amended more often than any other Canon. Its precept was carried over into the relatively recently enacted Code of Professional Responsibility. Challenges to the advertising ban, by contrast, are of very recent origin. I believe that the antiquity of the ban and the unsettled character of the

new rules, even at present, are factors which weigh against the award of attorneys' fees in this case, just as they did in *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976).

Furthermore, I believe that it is highly unseemly for this Court to award attorneys' fees against the Supreme Court of Virginia, a court of greater dignity. The idea of this Court issuing an order to the Supreme Court of Virginia ordering that Court to pay money to a litigant in this Court seems to me utterly inconsistent with the concepts of comity and federalism which are central to our form of government. I would not favor it except in those cases in which a citizen's rights under the federal Constitution could not otherwise be vindicated. I believe that such a case would be an extreme case, and I do not believe that we are faced with it at this juncture. Accordingly, even if the majority were correct in its view of the law applicable to this case, I would still dissent from an award of attorneys' fees against the Supreme Court of Virginia.

For these reasons, I respectfully dissent from the decision of the majority.

SUPREME COURT OF VIRGINIA ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 79-198. Argued February 19, 1980—Decided June 2, 1980

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises questions of whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U.S.C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, against the Virginia Court and its chief justice in his official capacity.

I

It will prove helpful at the outset to describe the role of the Virginia Court in regulating and disciplining attorneys. The Virginia Court has firmly held to the view that it has inherent authority to regulate and discipline attorneys. *Button v. Day*, 204 Va. 547, 552-555, 132 S.E.2d 292, 295-298 (1963). It also has statutory authority to do so. Section 54-48 of the Code of Virginia (1978) authorizes the Virginia Court to "promulgate and amend rules and regulations . . . [p]rescribing a code of ethics governing the professional conduct of attorneys-at-law. . . ."[1]

Pursuant to these powers, the Virginia Court promulgated

[1] "§ 54-48. Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and

the Virginia Code of Professional Responsibility (State Bar Code, Bar Code, or Code), the provisions of which were substantially identical to the American Bar Association's Code of Professional Responsibility. Section 54-48 provides no standards for the Virginia Court to follow in regulating attorneys; it is apparent that insofar as the substantive content of such a code is concerned, the State has vested in the court virtually its entire legislative or regulatory power over the legal profession.

Section 54-48 also authorizes the Virginia Court to prescribe "procedure for disciplining, suspending and disbarring attorneys-at-law"; and § 54-49 authorizes the court to promulgate rules and regulations "organizing and governing the association known as the Virginia State Bar, composed of the atorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting . . . violation[s]. . . ."[2] Acting under this author-

---

disciplinary procedure.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(a1) Prescribing procedure for limited practice of law by third-year law students.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law."

[2] "§ 54-49. Organization and government of Virginia State Bar.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

ity, the Virginia State Bar (State Bar or Bar) has been organized and its enforcement role vested in an ethics committee and in various district committees. Section 54-51 reserves to the courts the sole power to adjudicate alleged violations of the Bar Code,[3] and hence the role of the State Bar is limited to the investigation of violations and the filing of appropriate complaints in the proper courts. Under § 54-74, the enforcement procedure involves the filing of a complaint in a court of record, the issuance of a rule to show cause against the charged attorney, the prosecution of the case by the commonwealth attorney, and the hearing of the case by the judge issuing the rule together with two other judges designated by the chief justice of the Virginia Supreme Court.[4] Appeal lies to the Virginia Supreme Court.

---

[3] "§ 54-51. Restrictions as to rules and regulations.—Notwithstanding the foregoing provisions of this article, the Supreme Court shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys-at-law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall eliminate the jurisdiction of the Courts to deal with the discipline of attorneys-at-law as provided by law; and in no case shall an attorney, who demands to be tried by a court of competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner."

[4] "§ 54-74. Procedure for suspension or revocation of license.—(1) *Issuance of rule.*—If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

"(2) *Judges hearing case.*—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the

The courts of Virginia, including the Supreme Court, thus play an adjudicative role in enforcing the Bar Code similar to their function in enforcing any statute adopted by the Virginia Legislature and similar or identical to the role they would play had the Bar Code been adopted by the state legislature.

The Virginia Court, however, has additional enforcement power. As we have said, it asserts inherent power to discipline attorneys. Also, § 54-74 expressly provides that if the Virginia Court or any other court of record observes any act of unprofessional conduct, it may itself, without any complaint being filed by the State Bar or by any third party, issue a rule to show cause against the offending attorney.

---

time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the State treasury, from the appropriation for criminal charges.

"(3) *Duty of Commonwealth's attorney.*—It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

"(4) *Action of court.*—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"(5) *Appeal.*—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Virginia, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal."

Effective July 1, 1981, the judge issuing the rule to show cause will not participate in disciplinary cases, which are to be heard by three judges designated by the chief justice from any circuit other than the one in which the case is pending.

Although once the rule issues, such cases would be prosecuted by the commonwealth attorney, it is apparent that the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

II

This case arose when, in 1974, one of the appellees, Consumers Union of the United States, Inc. (Consumers Union), sought to prepare a legal services directory designed to assist consumers in making informed decisions concerning utilization of legal services. Consumers Union sought to canvass all attorneys practicing law in Arlington County, Va., asking for information concerning each attorney's education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. However, it encountered difficulty because lawyers declined to supply the requested information for fear of violating the Bar Code's strict prohibition against attorney advertising. Rule 2-102 (A)(6) of the Code prohibited lawyers from being included in legal directories listing the kind of legal information that Consumers Union sought to publish.[5]

[5] At the time Consumers Union sought to canvass Virginia attorneys, Disciplinary Rule 2-102 (A) of the State Bar Code provided in pertinent part: "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

* * * * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concen-

On February 27, 1975, Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U. S. C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman of the State Bar's Legal Ethics Committee. With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code. Plaintiffs sought a declaration that defendants had violated their First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning attorneys practicing in Arlington County, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6).

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Defendants moved for indefinite continuance of the trial on the grounds that the ABA and the State Bar were preparing amendments to relax the advertising prohibitions contained in DR 2-102(A)(6). Over plaintiff-appellees' opposition, the District Court granted defendants a continuance until March 25, 1976.

On February 17, 1976, the ABA adopted amendments

---

trates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

to its Code of Professional Responsibility which would permit attorneys to advertise office hours, initial consultation fees, and credit arrangements. Defendants then sought and obtained a further continuance to permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments. Although the governing body of the State Bar recommended that the Virginia Court adopt the ABA amendments to DR 2-102, on April 20, 1976, the court declined to adopt the amendments on the ground that they would "not serve the best interests of the public or the legal profession."

The action then proceeded to trial on May 17, 1976, and was decided on December 17, 1976. *Consumers Union of United States, Inc. v. American Bar Assn.*, 427 F. Supp. 506 (ED Va. 1976). The three-judge District Court concluded that abstention would be inappropriate in light of defendants' failure to amend the State Bar Code despite continuances based on the speculation that DR 2-102 (A)(6) would be relaxed. *Id.*, at 513-516. The court declared that DR 2-102 (A)(6) unconstitutionally restricted the right of plaintiff-appellees to receive and gather nonfee information and information concerning initial consultation fees. Defendants were permanently enjoined from enforcing DR 2-102 (A)(6) save for its prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

Plaintiff-appellees appealed to this Court, challenging the District Court's refusal to enjoin enforcement of the prohibition of fee advertising. Defendants brought a cross-appeal, arguing that DR 2-102 (A)(6) should have been upheld in its entirety. While these appeals were pending, we decided *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977), in which we held that enforcement of a ban on at-

torney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise the fees they charged for certain routine legal services. In light of *Bates*, the judgment below was vacated and the case was remanded for further consideration. 433 U. S. 917 (1977).

On remand, defendants agreed that in light of *Bates* DR 2-102 (A)(6) could not constitutionally be enforced to prohibit attorneys from providing plaintiff-appellees with any of the information they sought to publish in their legal services directory. Defendants proposed that a permanent injunction be entered barring them from enforcing DR 2-102 (A)(6) against attorneys providing plaintiff-appellees with information. On May 8, 1979, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it.[6]

Plaintiff-appellees also moved for costs, including an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988.[7] The defendants objected to any fee award on various grounds, including judicial immunity. They did not object to their paying other costs. Although holding the individual defendants immune from attorney's fees liability in their in-

[6] The District Court's final order provided in pertinent part:

"1. The publication described in plaintiff's complaint, as amended, is declared valid and constitutionally protected;

"2. The Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6) is declared unconstitutional on its face;

"3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforcement of Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6)."

[7] The Civil Rights Attorney's Fees Awards Act was enacted into law on October 19, 1976, five months after the trial in this action and two months before the District Court's initial decision. The Act is applicable in this case because Congress intended for the Act to apply to actions that were pending when the Act was passed. *Hutto v. Finney*, 437 U.S. 678, 694-695, n. 23 (1978).

dividual capacities, the District Court held that the Act authorized in proper circumstances the award of fees against the State Bar, the Virginia Court and the individual defendants in their official capacities. *Consumers Union of United States, Inc. v. American Bar Assn.*, 470 F. Supp. 1055, 1059-1061 (ED Va. 1979).

The District Court went on to conclude that special circumstances made it unjust to award attorney's fees against the State Bar or against the State Bar officers in their official capacities because it was not these defendants but the Virginia Court that had the power to change the State Bar disciplinary rules and because the State Bar and its officers had unsuccessfully sought to persuade the court to amend the Code to conform to what they deemed to be constitutional standards. There were no similar circumstances making it unjust to award attorney's fees against the Virginia Court and its chief justice in his official capacity. This was because the court had denied the State Bar's petition to amend the Code to conform to what were deemed to be the requirements of *Bigelow v. Virginia*, 421 U. S. 809 (1975), and had also failed to amend the Code to conform to the holding in *Bates v. State Bar of Arizona, supra.* Hence, "[i]t would hardly be unjust to order the Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F. Supp., at 1063. The parties were directed to attempt to reach an agreement on a reasonable sum, failing which the court would determine the fee.[8]

On May 23, 1979, defendants filed a petition for rehear-

[8] Judge Warriner dissented on the grounds that legislative immunity barred an award of attorney's fees and that it would be unjust to award attorney's fees against a state supreme court in the absence of a showing of bad faith. 470 F.Supp., at 1063.

ing, arguing for the first time, on judicial immunity grounds, that the Virginia Court and its chief justice were exempt from having declaratory and injunctive relief entered against them. It was also argued that in any event it was an abuse of discretion to enter the fee award against the Virginia Court and its chief justice.

Following denial of rehearing, the Virginia Court and its chief justice appealed, presenting the following questions:

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

Appellees moved to dismiss or affirm, the motion to dismiss urging that the claim of judicial immunity from declaratory or injunctive relief was not properly before the Court because it had not been timely raised in the District Court and had therefore been waived. We noted probable jurisdiction, 444 U. S. 914 (1979).

III

Title 42 U. S. C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this

> title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The District Court held that in light of the § 1983 judgment that had been entered in favor of appellees, the Act authorized an award of attorney's fees against appellants. Appellants urge that this was error. Their primary contention is that on the grounds of absolute legislative or judicial immunity they should have been excluded from the judgment below and also from liability for attorney's fees. Appellees on the other hand assert that neither judicial nor legislative immunity immunized these defendants from declaratory or injunctive relief as distinguished from a damages award; and in any event they insist that the judgment stand against these defendants because the Virginia Court itself shares direct enforcement authority with the State Bar and hence is subject to prospective judgments just as other enforcement officials are.[9]

A

Appellees sought declaratory and injunctive relief with respect to particular provisions of the State Bar Code propounded by the Virginia Court. Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking.

[9] As indicated in the text, the motion to dismiss the appeal rested on the failure of appellants to have raised the immunity issue at an earlier time. We noted probable jurisdiction, and appellees' brief on the merits has not again urged that the claim of immunity was not timely raised either with respect to the fee question alone or with respect to the entry of prospective relief against the Virginia Court and its chief justice. Their arguments, like those of appellants, are centered on the issues of judicial and legislative immunity.

The District Court below referred to the issuance of the Code as a judicial function, but this is not conclusive upon us for the purpose of deciding whether issuance of the Code is a judicial act entitled to immunity under § 1983. Judge Warriner, dissenting in the District Court, agreed with a prior District Court holding in *Hirschkop v. Virginia State Bar,* 421 F. Supp. 1137, 1156 (ED Va. 1976), rev'd in part on other grounds *sub nom. Hirschkop v. Snead,* 594 F. 2d 356 (CA4 1979), that in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity. Judge Warriner said:

> "Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature." 470 F. Supp., at 1064.

We agree with this analysis and hence must inquire whether the Virginia Court and its chief justice are immune from suit for acts performed in their legislative capacity.

We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. *Eastland v. United States Servicemen's Fund,* 421 U. S. 491, 502-503 (1975). The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid.* To preserve legislative independence, we have concluded that "legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove,* [341 U. S. 367, 376 (1951)], should be protected

not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Tenney v. Brandhove*, 341 U. S. 367 (1951). In *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.[10] In holding that § 1983 "does not create civil liability" for acts unknown

[10] This seems to be the view of the Court of Appeals for the Second Circuit in its recent holding in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (1980). That court held that the legislative immunity enjoyed by the members of a state legislative committee bars an action for declaratory and injunctive relief just as it bars an action for damages. Understanding that *Tenney* was based on the similarity between common-law immunity and the Speech or Debate Clause, the Second Circuit reasoned that legislative immunity should protect state legislators in a manner similar to the protection afforded Congressmen. The Courts of Appeals for the Fifth and Eighth Circuits have dismissed on immunity grounds suits seeking both damages and injunctive relief but without separately addressing the issue of immunity from prospective relief. *Safety Harbor v. Birchfield*, 529 F.2d 1251 (CA5 1976); *Smith v. Klecker*, 554 F.2d 848 (CA8 1977); *Green v. DeCamp*, 612 F.2d 368 (CA8 1980). The Court of Appeals for the Fourth Circuit, however, takes the contrary view and rejects the notion that the legislative immunity enjoyed by state officials bars suits for prospective relief. *Jordan v. Hutcheson*, 323 F.2d 597 (1963); *Eslinger v. Thomas*, 476 F.2d 225, 230 (1973). Both opinions of the Court of Appeals for the Fourth Circuit, however, were rendered prior to this Court's decision in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975). The Court of Appeals for the Ninth Circuit may have a similar view with respect to the immunity enjoyed by officials of a regional body exercising both legislative and executive powers. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (1977).

"in a field where legislators traditionally have power to act," *id.*, at 379, we did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund, supra,* at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock,* 445 U. S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution. *Eastland v. United States Servicemen's Fund, supra,* at 502-503, 505, 506; *Dombrowski v. Eastland, supra,* at 84-85; *United States v. Johnson,* 383 U. S. 169, 180 (1966); *Tenney v. Brandhove, supra,* at 377-379.[11] Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that

[11] Contrary to appellees' suggestion, we do not view *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U. S. 391 (1979), as indicating our approval of injunctive relief against a regional legislative body or its officers. No injunctive relief had been awarded when *Lake Country Estates* reached this Court. Although it is not entirely clear, the Court of Appeals in that case seemed to believe that immunity would not bar a suit for equitable relief against officials of the Tahoe Regional Planning Agency (TRPA). The court did not specify whether equitable relief could be founded on acts for which the officials would otherwise enjoy legislative immunity, and this Court did not have occasion to express any view on this question because the TRPA never challenged this aspect of the Court of Appeals' decision. We simply affirmed the Court of Appeals' holding that TRPA officials could not be held liable in damages for their legislative acts.

the Code in some respects would be held invalid, the defendants in that suit could successfully have sought dismissal on the grounds of absolute legislative immunity.[12]

Appellees submit that whatever may be true of state legislators, the Virginia Court and its members should not be accorded the same immunity where they are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances. *All* of such officials, it is urged, are not absolutely immune from civil suit. As much could be conceded, but it would not follow that, as appellees would have it, in *no* circumstances do those who exercise delegated legislative power enjoy legislative immunity. In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.

B

If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a

[12] Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy.

traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley v. Fisher*, 13 Wall. 335 (1872), we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson v. Ray*, 386 U. S. 547 (1967); *Stump v. Sparkman*, 435 U. S. 349 (1978). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief;[13] we have not addressed the question.[14]

---

[13] The Courts of Appeals for the Second, Fourth, and Seventh Circuits are of the view that judicial immunity does not extend to declaratory and injunctive relief. *Heimbach v. Village of Lyons*, 597 F. 2d 344, 347 (CA2 1979); *Timmerman v. Brown*, 528 F. 2d 811, 814 (CA4 1975); *Fowler v. Alexander*, 478 F. 2d 694, 696 (CA4 1973); *Harris v. Harvey*, 605 F. 2d 330, 335, n. 7 (CA7 1979); *Hansen v. Ahlgrimm*, 520 F. 2d 768, 769 (CA7 1975); *Jacobson v. Schaefer*, 441 F. 2d 127, 130 (CA7 1971). Three other Courts of Appeals, the Eighth, Ninth, and District of Columbia Circuits seem to agree. *Kelsey v. Fitzgerald*, 574 F. 2d 443, 444 (CA8 1978); *Williams v. Williams*, 532 F. 2d 120, 121-122 (CA8 1976); *Shipp v. Todd*, 568 F. 2d 133, 134 (CA9 1978); *Briggs v. Goodwin*, 186 U. S. App. D. C. 179, 184, n.4, 569 F.2d 10, 15, n.4 (1977). It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurringly dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

[14] Although we did not address the issue, a state judge was among the defendants in *Mitchum v. Foster*, 407 U. S. 225 (1972), where the Court held that § 1983 served to pierce the shield of 28 U. S. C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U. S. 339, 346 (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or *judicial*. The Court also noted

We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.[15]

Prosecutors enjoy absolute immunity from damages liability, *Imbler v. Pachtman*, 424 U. S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they

---

that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations or were in league with those who were bent upon abrogating federally protected rights. 407 U. S., at 242.

In *Boyle v. Landry*, 401 U. S. 77 (1971), and *O'Shea v. Littleton*, 414 U. S. 488 (1974), lower courts had entered injunctions against state officials including state-court judges. In each case, we reversed on the grounds that no case or controversy had been made out against any of the appellants in this Court; and in *O'Shea*, we concluded that even assuming that there was a case or controversy, insufficient grounds for equitable relief had been presented. We did not suggest, however, that judges were immune from suit in their judicial capacity. *Gerstein v. Pugh*, 420 U. S. 103 (1975), involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to this Court. We affirmed the declaration that the Florida procedures at issue were unconstitutional and held that *Younger v. Harris*, 401 U. S. 37 (1971), did not bar injunctive relief in the circumstances of the case. No issue of absolute immunity was raised or addressed.

[15] Of course, as *Boyle v. Landry, supra*, and *O'Shea v. Littleton, supra*, indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person v. Association of the Bar of New York*, 554 F. 2d 534, 536-537 (CA2 1977).

are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh,* 420 U. S. 103 (1975), is only one of a myriad of such cases since *Ex parte Young,* 209 U. S. 123 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.[16]

IV

Because appellees properly prevailed in their § 1983 action, the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, authorized the District Court, "in its discretion," to award them "a reasonable attorney's fee," which may be recovered from state officials sued in their official capacities. *Hutto v. Finney,* 437 U. S. 678, 694 (1978). Applying the standard of *Newman v. Piggie Park Enterprises,* 390 U. S. 400, 402 (1968), the District Court indicated that attorney's fees should ordinarily be awarded

[16] Although appellants argued below that the Virginia Court as an entity is not a "person" suable under § 1983, they have not raised this issue before this Court. In any event, prospective relief was properly awarded against the chief justice in his official capacity; and absent a valid claim of immunity, the question remains whether the District Court's award of attorney's fees was proper. Although we would not have appellate jurisdiction under 28 U. S. C. § 1253 to decide the attorney's fees question had it alone been appealed, because the case is properly here on the § 1983 issue we have jurisdiction to decide the attorney's fees issue. Cf. *Rosado v. Wyman,* 397 U. S. 397, 404-405 (1970).

" 'unless special circumstances would render such an award unjust.' " 470 F. Supp., at 1061.[17] Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees. The District Court nevertheless considered it unjust to require the State Bar defendants to pay attorney's fees because they had recommended that the State Bar Code be amended to conform to what the Bar thought our cases required and because the Virginia Court declined or failed to adopt this proposal. No similar circumstances excused the Virginia Court, the court held, for it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code.

We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the District Court's award of attorney's fees in this case was premised on acts or omissions for which appellants enjoyed absolute legislative immunity. This was error.

We held in *Hutto v. Finney, supra,* that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legis-

---

[17] The District Court derived this standard from the Senate Committee Report on the Civil Rights Attorney's Fees Awards Act, which stated:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)." S. Rep. No. 94-1011, p. 4 (1976).

lative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity. There is no similar indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damages awards, H. R. Rep. No. 94-1558, p. 9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief. Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking au-

thority in a manner that satisfied the District Court. We therefore vacate the award of attorney's fees and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

ORDERS FROM JUNE 9 THROUGH JUNE 23, 1980

JUNE 9, 1980

Vacated and Remanded on Appeal

No. 79-185. CONSUMERS UNION OF UNITED STATES, INC., ET AL. *v.* VIRGINIA STATE BAR ET AL. Appeal from D. C. E. D. Va. Judgment vacated and case remanded for further consideration in light of *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719 (1980). MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 470 F. Supp. 1055.

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

AMERICAN BAR ASSOCIATION et al.

Civ. A. No. 75-0105-R.

United States District Court,
E. D. Virginia,
Richmond Division.

January 8, 1981.

Before BRYAN, Senior Circuit Judge, and MERHIGE and WARRINER, District Judges.

ALBERT V. BRYAN, Senior Circuit Judge:

This action has been pending since 1975 before us, sitting as a three-judge tribunal, with appeals at intervals to the Supreme Court of the United States. It has now been refined to the sole question of whether the plaintiff, Consumers Union of the United States, Inc. (Consumers), having prevailed under 42 U.S.C. § 1983 on its assertion that Virginia Bar Code Disciplinary Rule 2-102(A)(6) (the Rule) unconstitutionally hindered its publication of a directory of attorneys practicing in Arlington County, Virginia,[1] is entitled to recover attorney's fees under 42 U.S.C. § 1988 from the Virginia State Bar (Bar) and/or the Supreme Court of Virginia (Virginia Court).[2]

Detailed reiteration of the earlier course of this litigation

[1] *Consumers Union of United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D.Va.1979). The award of attorney's fees in this case, *id.* at 1058-63, was vacated, *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U. S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), and is before us again on remand.

[2] Unless otherwise indicated, references herein to the Supreme Court of Virginia include its Chief Justice in his official capacity.

is rendered unnecessary by the comprehensive opinion of the United States Supreme Court in *Supreme Court of Virginia v. Consumers Union of the United States,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). Therein the Court relates the constituent facts, with the rulings of this Court thereon, that induced us to allow Consumers' claim for attorney's fees against the Virginia Court, while disallowing a like claim against the Bar. *See id.* 446 U.S. at 721-734, 100 S.Ct. at 1969-74.

The Supreme Court vacated the award of attorney's fees because it rested in part on consideration of the Virginia Court's adoption, and retention even after *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), of the disputed disciplinary provision—actions the Supreme Court held to enjoy absolute legislative immunity. 446 U.S. at 736-37, 100 S.Ct. at 1977. On remand we again consider the propriety of a fee award against each defendant.

We adhere to the view, previously expressed in *Consumers Union of United States, Inc. v. American Bar Association,* 470 F.Supp. 1055 (E.D.Va.1979), that special circumstances exist in this case rendering a fee award against the Bar unjust. As before, this conclusion is grounded on the Bar's endeavors to have the Bar Code amended to conform to constitutional standards. *See id.* at 1062-63.

The Supreme Court, even as it vacated this Court's fee award, indicated that the Virginia Court's capacity as a State enforcement authority rendered it properly subject to suit in this case. 446 U.S. at 720-725, 729-737, 100 S.Ct. at 1968-71, 1973-77. Moreover, it emphasized that a fee award based solely on the Virginia Court's enforcement role would not be improper. *Id.* 446 U.S. at 736-37, 100 S.Ct. at 1977.

The Virginia Court is a fundamental source and conduit of disciplinary enforcement authority. Although the Bar may be more active in this sphere on a day-to-day basis, it acts merely as an "administrative agency of the Court." [3] It seems clear that "in the circumstances of this case, a sufficiently concrete dispute is . . . made out against the Virginia Court as an enforcer," 446 U.S. at 737 n.15, 100 S.Ct. at 1977 n.15, not only for amenability to suit, but also for the purpose of a fee award to Consumers, the prevailing party.

Nothing in the Supreme Court's opinion casts doubt on the propriety of this Court's earlier application of *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), to this case.[4] Under that standard, a court ordinarily should award reasonable attorney's fees to a prevailing civil rights plaintiff "unless special circumstances would render such an award unjust." *Id.* at 402, 88 S.Ct. at 966.

Upon review of the record throughout this litigation, we conclude that no special circumstances have been shown that would render unjust an award of attorney's fees against the Supreme Court of Virginia. Accordingly, we will order the Supreme Court of Virginia and its Chief Justice, in their official capacities, to pay to Consumers reasonable attorney's fees for the services of its counsel in this action, insofar as such services were performed to prevent the enforcement of the Rule. The amount of the fees, if not agreed upon between the Supreme Court of Virginia and Consumers within 30 days from the date of our order, shall be determined by this Court directly, or after reference to and report thereon by a master.

[3] Va.Code § 54-49.

[4] *See* 470 F.Supp. at 1061. The Supreme Court noted the application of *Piggie Park*, and commented briefly thereon. 446 U. S. at 737 & n.17, 100 S.Ct. at 1977 & n.17.

WARRINER, District Judge, dissenting in part and concurring in part.

I dissent from the majority opinion with respect to its award of attorney's fees against the Supreme Court of Virginia.[1] Insofar as the opinion speaks to the Virginia State Bar, I concur in the result only.

I.

My dissent with respect to the fee award against the Virginia Court can be understood best by examining the record. Plaintiffs sought a declaratory judgment that the Virginia Court and the State Bar had violated the First and Fourteenth Amendment rights of plaintiffs and their members to gather, publish, and receive information regarding lawyers in Arlington County, Virginia. Plaintiffs also sought an injunction against the enforcement of the rule prohibiting advertising by lawyers, DR2-102(A)(6) of the Code of Professional Responsibility of the Virginia State Bar. The Complaint alleged that the Virginia Court had promulgated the Code[2] and that the State Bar had the delegated authority to enforce the Code. *Consumers Union of United States, Inc. v. American Bar Ass'n.*, 427 F.Supp. 506, 508 (E.D.Va.1976). The majority of this Court concluded in its original opinion that plaintiffs had a First Amendment right to gather, publish, and receive consumer

---

[1] Reference to the Supreme Court of Virginia, or to the Virginia Court, includes its Chief Justice in his official capacity.

[2] The sole allegation in the Complaint implicating the Supreme Court of Virginia in any way reads as follows:

> Defendant Supreme Court of Virginia adopted and promulgated the State Bar Code, purporting to act under the authority of § 54-48 of the Virginia Code.

Complaint, ¶ 3.

information about lawyers, save for fee information.[8] *Id.* at 523. Accordingly, the majority held that insofar as DR2-102(A)(6) prohibited the advertising of not inherently misleading or deceptive consumer information, with the above exception, the public's right to the information was paramount, and the rule was *pro tanto* invalid. *Id.* at 521-23. In addition to this declaratory judgment, the Virginia Court and State Bar were enjoined from enforcing the rule. *Id.* at 523.

All parties appealed to the United States Supreme Court. The majority opinion was vacated and the case was remanded for "further consideration in light of *Bates v. State Bar of Arizona* [433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)]." *Consumers Union of United States, Inc. v. Virginia State Bar,* 433 U.S. 917, 97 S.Ct. 2993, 53 L.Ed.2d 1104 (1977). In light of *Bates,* we held on remand that the prior exception against fee advertising could no longer be maintained and that plaintiffs were entitled to gather and publish, and their members were entitled to receive, truthful information about lawyers, including fee information. *Consumers Union of United States, Inc. v. American Bar Association,* 470 F.Supp. 1055, 1058 (E.D.Va.1979). Thus, DR2-102(A)(6) was struck in its entirety and the Virginia Court and the State Bar proposed and consented to the entry of a decree enjoining them from enforcing the invalidated rule.

Plaintiffs then asked for an award of costs, including attorney's fees under 42 U.S.C. § 1988. The majority of this Court held first that the Virginia Court was not protected by judicial immunity from an award of attorney's fees for

[8] The concurring judge, the writer of this dissent, held that fee advertising, except for the fee charged for an initial interview, was inherently misleading. 427 F.Supp. at 525 (Warriner, J., concurring).

acts performed in its "judicial capacity." 470 F.Supp. at 1059-63. Second, finding no "special circumstances" rendering an award of attorney's fees unjust, *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), the majority required the Virginia Court to pay a reasonable counsel fee to be determined by this Court. The clearly stated basis for the award was that the Virginia Court was recalcitrant in amending or repealing DR2-102(A)(6) after *Bates.* 470 F.Supp. at 1062-63. The State Bar, on the other hand, had petitioned the Virginia Court, even prior to *Bates,* to amend the rule to conform to what it deemed to be constitutional standards. This was considered by this Court as a special circumstance rendering an award of attorney's fees against the Bar unjust. 470 F.Supp. at 1062-63.

In my dissenting opinion I raised the argument that the promulgation of the Bar Code by the Virginia Court was not an act of adjudication but one of rulemaking. 470 F.Supp. at 1063-73. I concluded that the Virginia Court enjoyed absolute legislative immunity from suit in performing this rulemaking function. Thus, the Virginia Court was immunized from an award of attorney's fees. I concluded also that the Virginia Court should have been dismissed from the action entirely on the basis of its legislative immunity even though its counsel had not pled or argued this defense. *Id.* at 1073 n. 6.

On appeal, the United States Supreme Court disagreed with the majority opinion that promulgation of the Code was a judicial act. "[P]ropounding the Code was not an act of adjudication but one of rulemaking." *Supreme Court of Virginia v. Consumers Union of United States,* 446 U.S. 719, 729, 100 S.Ct. 1967, 1973, 64 L.Ed.2d 641 (2 June 1980). The Supreme Court agreed with the dissenting opin-

ion that the Virginia Court was cloaked with absolute legislative immunity from suit itself for actions in its legislative capacity. 446 U.S. at 729-37, 100 S.Ct. at 1973-77.

Instead of dismissing the Virginia Court from the action at this point, the Supreme Court went further and concluded that "the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities." 446 U.S. at 734, 100 S.Ct. at 1975. The basis for this conclusion was apparently twofold. First, the Virginia Court had for some reason argued before the Supreme Court that it had inherent and statutory authority to discipline and regulate the Virginia Bar. The Supreme Court accepted this admission and held that this enforcement authority makes the Virginia Court a proper defendant in a suit under 42 U.S.C. § 1983 for declaratory and injunctive relief. 446 U.S. at 734 & 736 n.15, 100 S.Ct. at 1975 & 1977 n.15. Second, in light of the *Bates* decision the Virginia Court and the State Bar had accepted that DR2-102(A)(6) could no longer be enforced against attorneys who provide plaintiffs with the desired information. The Virginia Court and State Bar therefore had proposed and consented that they be permanently enjoined from enforcing the by then unenforceable rule. Accordingly, in our final order, consistent with the parties' consent, we enjoined the Virginia Court and the State Bar from enforcing the rule. *See* 446 U.S. at 727 & 725 n.6, 100 S.Ct. at 1971 & 1972 n.6. Thus apparently reasoned the Supreme Court, since the Virginia Court claimed it had enforcement functions and since it had consented to be enjoined from exercising that function, a routine § 1983 settlement had taken place.[4]

[4] The Supreme Court had this to say:

As already indicated, [Va.Code § 54-74 (Repl. Vol. 1978)] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and

With all respect I submit that the Supreme Court's ruling with respect to the Virginia Court is somewhat contradictory. The Court recognized at the outset of its opinion that plaintiffs' complaint "alleged only that the court promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code." 446 U.S. at 725-26, 100 S.Ct. at 1971. In addition, the Supreme Court recognized that the extent of the Virginia Court's statutory enforcement power is that it, along with all Virginia courts, may issue a rule against an attorney to show cause why his license to practice law should not be suspended or revoked. 446 U.S. at 721, 100 S.Ct. at 1969. Beyond this, the role of the Virginia Court or any other court of record is wholly and simply adjudicative. The actual prosecution is by the Commonwealth's attorney. *See* Va.Code § 54-74 (Cum. Supp.1980). Nevertheless, the Supreme Court concluded that "the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt." 446 U.S. at 721, 100 S.Ct. at 1969. The Supreme Court did not disclose the basis for this conclusion, and I can discern none. Indeed, the Virginia Court and other courts in Virginia exercise their contempt power in essentially the same manner as they exercise their authority over a lawyer in a disciplinary matter. *Compare Holt v. Virginia,* 381 U.S. 131, 132, 85 S.Ct. 1375, 14 L.Ed.2d 290 (1965) (Virginia judge directed Commonwealth's attorney to prepare order directing lawyer to show cause why he should not be punished for

its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.

446 U. S. at 735, 100 S.Ct. at 1976. *See also Id.* 446 U. S. at 736 n.15, 100 S.Ct. at 1977 n.15.

contempt) *with* Va.Code § 54-74 (Cum.Supp.1980) (Virginia Court or other court of Virginia issues a rule against attorney to show cause why his license to practice law should not be suspended or revoked; prosecution is by Commonwealth's attorney). Thus, the Virginia Court's enforcement authority under § 54-74 is not readily, if at all, distinguishable either functionally or legally from its contempt power.[5]

With respect to attorneys fees, the Supreme Court pointed out that this Court had premised its award on acts or omissions for which the Virginia Court enjoyed absolute legislative immunity. 446 U.S. at 737, 100 S.Ct. at 1977. The Supreme Court held that this Court erred in basing the award of attorney's fees on the Virginia Court's failure to amend or repeal DR2-106(A)(6) [sic].

> [I]t was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court.

Id. By way of *dictum*, the Supreme Court stated that it would not be improper to award attorneys fees based upon the Virginia Court's enforcement role. *Id.*

The majority opinion of this Court on remand has accepted this *dictum* as a command. With dispatch, the majority has ordered the Virginia Court and its Chief Justice to pay plaintiffs' reasonable attorney's fees, "insofar as such services were performed to prevent the enforcement of the Rule." *Ante*, at 824. The majority finds support for its decision in its view that the Supreme Court vacated

> the award of attorney's fees because it rested *in part* on consideration of the Virginia Court's adoption, and

[5] The only possible distinction is that the contempt power may be exercised summarily, whereas the enforcement authority may not. *See* Va.Code § 54-74 (Cum.Supp.1980).

> retention even after *Bates v. State Bar of Arizona*, 433 U.S. 350 [97 S.Ct. 2691, 53 L.Ed.2d 810] (1977), of the disputed disciplinary provision—actions the Supreme Court held to enjoy absolute legislative immunity. 446 U.S. at 736, 100 S.Ct. at 1977.

Ante, at 823. (Emphasis added). This contention is erroneous. The majority's award of attorney's fees was based *entirely* on the Virginia Court's legislative role. No reading of the majority opinion admits to any other conclusion. *See* 470 F.Supp. at 1062-63. The Supreme Court has so held:

> The District Court's award of attorney's fees in this case was premised on acts or omissions for which [the Virginia Court] enjoyed absolute legislative immunity.

446 U.S. at 732-34, 100 S.Ct. at 1975. If the fee award had rested only "in part" on the Virginia Court's legislative role, the Supreme Court may not have vacated and remanded; it most properly would have affirmed, stating the correct basis for the award, *e.g.*, the Virginia Court's enforcement role, and would have remanded only for a determination of reasonable fees.[6] Because this Court's award of attorney's fees was wholly in error the judgment was vacated and remanded instead.

Admittedly, the Virginia Court possesses the inherent and statutory authority to discipline and regulate the Virginia Bar. It is also true that we, in our pre-*Bates* opinion, enjoined the Virginia Court together with the State Bar from enforcing DR2-106(A)(6) [sic]. After *Bates*, the Virginia Court consented to the entry of a decree enjoining it and the

---

[6] Indeed, had there been any proven basis in the record for the award of fees, the Supreme Court would not have awarded costs on appeal in favor of the Virginia Court. The Virginia Court clearly prevailed on appeal with respect to the attorney's fees issue.

State Bar from enforcing the invalid rule against lawyers who provided the information plaintiffs sought. Strictly speaking, then, it could be said that plaintiffs prevailed against the Virginia Court in its enforcement capacity.[7] Consequently, the Supreme Court has concluded that we properly held the Virginia Court liable in its enforcement role under § 1983 and has now foreclosed an examination here of that issue.

The point of my dissent, then, is that we are not foreclosed from re-examining the nature and extent of the Virginia Court's § 1983 liability in its enforcement capacity as it relates to the discretionary award of judgment against the Virginia Court for plaintiffs' counsel fees. Indeed, the Supreme Court has not commanded an award as the majority here supposes, but has directed that we consider the Virginia Court's "own *direct* enforcement role" in assessing attorney's fees. 446 U.S. at 739, 100 S.Ct. at 1978. (Emphasis added).

It is true that "[f]ee awards against enforcement officials are run-of-the-mill occurrences. . . ." 446 U.S. at 739, 100 S.Ct. at 1978. In fact, it is the general rule that attorney's fees are ordinarily awarded under § 1988 to prevailing civil rights plaintiffs "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, supra,* 390 U.S. at 402, 88 S.Ct. at 966. With respect to the inquiry into the existence of "special circumstances," the Fourth Circuit has instructed:

> If this inquiry is needed, it should . . . be an intensely pragmatic one. Its focus is rightly upon the justice

[7] As demonstrated within, no such explicit holding emanated from this Court for the simple reason that no such issue was ever presented to this Court. It was actually the Supreme Court of Virginia which, on appeal, injected its enforcement role into the litigation.

> under the total range of circumstances of conferring the benefit and imposing the concomitant burden represented by the fee award.

Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979). The court's discretion is to be exercised bearing in mind the purpose of § 1988 to encourage "private attorney general" suits. *Id.* It is inconsistent with the requirement of "an intensely pragmatic" inquiry to look at isolated phrases from the Supreme Court's opinion and pre-emptorily award counsel fees as the majority opinion has done. Instead, the inquiry must focus "upon the justice under the total range of circumstances" of awarding attorney's fees in this case.

The most careful examination of the record reveals that the issue of the Virginia Court's enforcement role was never presented to us. Prior to *Bates* there were no allegations, no proffers of evidence, no briefs, no arguments, and no findings of fact by this Court with respect to the direct or even the indirect enforcement role of the Virginia Court. The allegations and proofs showed no more than that the Virginia Court had adopted the Bar Code and had promulgated a procedure for enforcement of the Code. In practice the Virginia Court's day-to-day enforcement authority had been delegated to the State Bar and the various district committees. Va.Code § 54-49 (Repl.Vol.1978); Rules for the Integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49 (1975). It was as likely as not, under the record before us, that Virginia lawyers were personally opposed to advertising as it was that they refrained for fear of any prosecution by the Virginia Court. The issue, it must be repeated, simply was not alleged, proved, argued, or otherwise developed in the litigation in the trial court. This is a significant factor in determining whether plaintiffs are entitled to attorney's fees because of

their efforts, prior to *Bates*, to enjoin the enforcement of the rule by the Virginia Court. They made none.

After *Bates*, the issue of the Virginia Court's enforcement role again was not raised by plaintiffs. This is not at all surprising. At this time, plaintiffs, along with all informed attorneys in the United States, knew that lawyers were free to advertise so long as the information was not deceptive or misleading. No one reasonably would have contended that DR2-106(A)(6) [sic] could be enforced at that time.[8]

Plaintiffs argued for the first time on remand that the Virginia Court has a "direct" enforcement role. This contention obviously has been grasped by plaintiffs as a result of the Supreme Court's suggestion that an award of fees against the Virginia Court in its enforcement capacity would not be improper. The record indicates, as I have attempted to demonstrate above, that plaintiffs never alleged nor proved in this case that the Virginia Court had a direct enforcement role with respect to Virginia lawyers.[9] As a

[8] This Court's post-*Bates* opinion related the following incident:

> In December, 1978, a Virginia Beach, Virginia, attorney was indicted under two Virginia statutes for publication of an advertisement that was virtually identical to the advertisement which the Supreme Court in *Bates* found constitutionally protected, but which DR2-102(A)(6) still prohibited. The chilling effect of DR2-102(A)(6) on First Amendment freedoms is yet extant, even if not subject to objective calculations.

470 F.Supp. at 1062.

While this recitation of alleged facts *aliunde* the record has emotional appeal, it had no legal significance in this case. The Virginia Beach lawyer was not prosecuted by the Virginia State Bar or by the Virginia Supreme Court. Neither entity had brought the charges. Further, the lawyer was not prosecuted under DR2-106(A)(6) [sic] or any other rule promulgated by or subject to be enforced by defendants. He was prosecuted by a local Attorney for the Commonwealth under statutes enacted by the General Assembly. If this incident tends to prove anything it tends to prove that defendants were *not* enforcing the defunct advertising ban.

[9] In addition, it should be noted that as a matter of law and fact

practical matter plaintiffs could not have so alleged or proved. The Virginia Court's so-called enforcement role is simply the authority to issue a rule to show cause against an offending attorney[10] in essentially the same manner as it would exercise its contempt power against an attorney. *See*

---

the Virginia Court could not have disciplined or punished plaintiffs in its enforcement capacity. Unlik. Virginia lawyers, plaintiffs were not threatened by prosecution for violation of DR2-106(A)(6) [sic]. Plaintiffs simply could not obtain the information sought to publish their directory because attorneys chose for whatever reason to obey the rule or to follow their own sense of propriety. Plaintiffs' First Amendment rights were thwarted, but were not "chilled." "Chilling" is philosophically and legally distinguishable from "thwarting." A citizen is chilled in the exercise of his rights when the State puts him in fear to deter him from the free exercise of his rights. Another citizen who is thereby denied an opportunity to hear the chilled citizen is thus thwarted. Both have protectable rights, but the citizen put in fear by the State elicits greater concern from the law.

This is not to suggest that plaintiffs were not entitled to vindicate their constitutional rights. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 763-65, 96 S.Ct. 1817, 1822-23, 1826-27, 48 L.Ed.2d 346 (1976); *Consumers Union of U. S. v. American Bar Ass'n*, 427 F.Supp. at 517. As was observed at oral argument before this Court on remand, it matters not to the plaintiff who wields the buzz saw if he is being chewed up. It does matter, however, to the indiscriminately sued defendant who wielded not the buzz saw, in this case, the Virginia Court. The Virginia Court could only have affected plaintiffs in its legislative capacity as a result of its promulgation of the Bar Code. In this capacity the Virginia Court was immune from suit. 446 U. S. at 729, 100 S.Ct. at 1973. It is thus unjust to award fees against the Virginia Court in an enforcement capacity, a capacity in which the Virginia Court was powerless as against plaintiffs.

[10] In practice the issuance of such a rule is a rarity. Almost all complaints against offending lawyers emanate from sources other than the Supreme Court of Virginia. Inquiry of Allen L. Lucy, who has been Deputy Clerk and Clerk of the Supreme Court of Virginia, successively, since 1952, revealed that the Supreme Court of Virginia has issued less than a half dozen rules to show cause against offending lawyers in nearly thirty years.

This special inquiry was necessary to get a glimpse as to what the evidence might have been had plaintiffs alleged or attempted to prove the Virignia Court had exercised enforcement authority in this case.

Va.Code § 54-74(1) (Cum.Supp.1980). The day-to-day authority to investigate and to report Bar Code violations to the Circuit Courts is vested in the State Bar through its several district committees. Rules for the Integration of the Virginia State Bar, Part Six, Section IV, Subsection 13, 215 Va. 859, 946-49 (1975). The actual prosecution of a violation is by the attorney for the Commonwealth in the Circuit Courts of the State. Va.Code § 54-74(3) (Cum.Supp. 1980). By statute the Virginia Court is, then, relegated to the adjudicative function of hearing Bar Code violation appeals. Va.Code § 54-74(5) (Cum.Supp.1980). Whatever inherent or statutory enforcement role may be possessed by the Virginia Court, as a practical matter its *exercise* of power in virtually all cases is as a court of appeals of Bar Code violations.

That the Virginia Court ever consented to be included in the injunction prohibiting enforcement of DR2-106(A)(6) [sic] was an error resulting entirely from this Court's and defense counsel's lack of assiduousness, and not from plaintiffs' efforts to enjoin "enforcement" of the rule by the Virginia Court. Indeed, had the defense of legislative immunity [been] raised in the initial stages of the law suit the Virginia Court would have been dismissed out of hand. The defense of legislative immunity was overlooked.[11] As a result, the Virginia Court was permitted to be included as an injunctive defendant in both the majority's pre- and post-*Bates* injunction orders. This pleading lapse does not justify an award of attorney's fees against the Virginia Court. Indeed, such a circumstance is a "special circumstance" rendering an award of fees unjust.

[11] It is clear that the defense had not been waived by the Virginia Court as is evidenced by the Supreme Court's decision. *See* 446 U. S. at 729-37, 100 S.Ct. at 1973-77. *See also* 470 F.Supp. at 1071-72 (Warriner, J., dissenting).

In summary, I believe it is an abuse of discretion to award attorney's fees against the Virginia Court for not doing that which it was not alleged to have done; for not doing that which it was not proved to have done; for not doing that which, as against plaintiffs, it could not have done; and for not doing that which, in practice, it rarely does. Such an award would do nothing to further the purpose of § 1988 to encourage "private attorney general" suits. Rather, an award against the Virginia Court in its so-called enforcement role, based upon the record in this case, would simply be a determination that the fee should be paid by the Virginia Court without regard to the justice of the case.

II.

With respect to the State Bar, I concur with the result in the majority opinion but for a different reason. The majority has concluded that "the Bar's endeavors to have the Bar Code amended to conform to constitutional standards . . ." constitute special circumstances rendering a fee award unjust. *Ante*, at 825. This conclusion slips into the same error as did the majority's earlier opinion.[12] 470 F.Supp. at 1058-63. It focuses on legislative rather than enforcement activity.

[12] I can only assume, but not conclude, that our finding of special circumstances with respect to the State Bar was in error because the Bar's separate appeal was vacated and the case was remanded "for further consideration in light of *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U. S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)." *Consumers Union of United States v. Virginia State Bar*, 447 U. S. 901, 100 S.Ct. 2980, 64 L.Ed.2d 850 (U.S.Sup.Ct. 1980). However, the Supreme Court did not specifically rule nor indicate in *Consumers Union* that our finding with respect to the State Bar was "clearly erroneous." *See* 446 U. S. at 737, 100 S.Ct. at 1977. *See generally, United States v. United States Gypsum Co.*, 333 U. S. 364, 394-95, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948) (interpreting Fed. R.Civ.P. 52(a)). The Supreme Court merely stated that "[w]e are not convinced that it would be unfair to award fees against the State Bar. . . ." 446 U. S. at 739, 100 S.Ct. at 1978.

If the fact that the State Bar lobbied the Virginia Court for legislation to amend the Code is relevant at all, it is because it demonstrates, first, that the Bar was unwilling to enforce the rule against advertising and, second, that the Bar was not antagonistic to plaintiffs' claim for relief. Nevertheless, when the Virginia Court rejected the State Bar's petition for amendment to DR2-206(A)(6)[sic], the Bar was duty bound, as the Virginia Court's administrative agency for the regulation of the practice of law,[13] to defend the rule. In this context, the State Bar was required to defend on proper legal grounds a rule it believed to be unconstitutional. When the rule was ultimately struck down as unconstitutional, the State Bar was enjoined from enforcing it.[14] Technically, then, plaintiffs prevailed against the State Bar, even though the Bar was not opposed to the result. Under these circumstances, I cannot in good conscience require the Bar to pay attorney's fees simply because plaintiffs were technically the "prevailing parties."

In addition, it would be unfair to award fees against the State Bar for dutifully defending DR2-106(A)(6)[sic]. This might not be true if the rule had been widely perceived, pre-*Bates*, as unconstitutional. This was not the case, however. The ban on lawyer advertising was a time-honored and universally accepted regulation to the practice of law. Its constitutionality was not seriously questioned prior to *Bates*,

---

[13] *See* Va.Code § 54-49 (Repl. Vol. 1978).

[14] It should be remembered that in Virginia, the State Bar is not the repository of enforcement authority. As the Supreme Court recognized, the Bar's actual enforcement authority is vested in district committees. 446 U. S. at 721, 100 S.Ct. at 1969. Nevertheless, the Supreme Court said *in dictum* that it would not be unfair to award fees against the State Bar in its enforcement capacity. *Id.* 446 U. S. at 737, 100 S.Ct. at 1977. Here again the factual basis for the Supreme Court's opinion is not apparent in the trial record so far as this writer can discern.

in which the Supreme Court held, in a 5 to 4 decision, that attorneys have a First Amendment right to advertise truthful information about their profession. Before the *Bates* decision the State Bar could have avoided its duty to defend DR2-106(A)(6)[sic] only by pretending that this historical basis for the rule did not exist. Instead, the Bar did its best to defend the rule which it had not promulgated and did not fully support. To require the State Bar to pay plaintiffs' counsel fees under these circumstances would be a warning to all defendants similarly situated that they defend at their peril. In doubtful, but expensive litigation, the courts will be witnessing a "dive," in boxers' parlance, rather than the vigorous defense our adversary system demands. Congress could not have intended this result when it enacted § 1988.

These circumstances are also significant as they relate to the State Bar's "good faith." Though the Supreme Court has ruled that "bad faith" is not necessary for an award of attorney's fee under § 1988, *Hutto v. Finney*, 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-78, 57 L.Ed.2d 522 (1978), the Court has not ruled that a party's good faith cannot at least be considered as a special circumstance in determining whether an award of fees is appropriate. *See* 470 F.Supp. at 1074 (Warriner, J., dissenting). Accordingly, the State Bar should not be required to pay plaintiffs' counsel fees where it defended the rule on proper legal grounds after making a good faith effort to have the Bar Code amended to reflect its perceived standards of constitutionality, and where it made a good faith effort to reach an amicable settlement between the parties after *Bates*.

On the basis of these special circumstances, an award of attorney's fee against the Supreme Court of Virginia and against the Virginia State Bar would be unjust and properly should be denied.

MERHIGE, District Judge, concurring.

I concur with the views expressed in Judge Bryan's succinct and learned opinion and write briefly in response to the dissent of my colleague, Judge Warriner.

While concluding it fruitless to address in any detail the views expressed in the dissent, I suggest that adoption of those views would, to a great extent, represent a rejection of Virginia's highest court's expressed opinion of its statutory and inherent enforcement authority. *See Button v. Day*, 204 Va. 547, 132 S.E.2d 292.

I decline, out of respect for the opinions of the Supreme Court of Virginia and the Supreme Court of the United States, as well as a duty to follow the law as enunciated by the Supreme Court, to ignore that of which I have judicial notice. *See Gormly v. Bunyan*, 138 U.S. 623, 635, 11 S.Ct. 453, 457, 34 L.Ed. 1086 (1890); *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 134, 40 L.Ed. 293 (1895).

Additionally, contra to Judge Warriner's expressed statements, the record amply supports and mandates the action the court this day takes.

Lest, however, one mistakenly attributes this response as a total rejection of the statements contained in the dissent, I acknowledge my concurrence with Judge Warriner's view that "Plaintiffs' First Amendment rights were thwarted. . . ." The complete statement reads, "Plaintiffs' First Amendment rights were thwarted, but were not 'chilled' ".[1] If, as I conclude, it is intended to suggest that a "thwarting" of one's First Amendment rights is less onerous than the "chilling" of one's First Amendment rights, my rejection is total.

---

[1] Footnote 9 of the dissent.

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.